

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

Headquarters and
Headquarters Company,
United States Army Garrison
(Unit/Command Name)

(Social Security Number)

U.S. Army

(Branch of Service)

PFC/E-3

(Rank)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIALConvened by Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Motion

for Court Order
for Mental Health Professionals

16 August 2012

RELIEF SOUGHT

The prosecution in the above case respectfully requests that, in the interest of justice, this Court issue an order to enable the Accused's mental health professionals to speak with the prosecution regarding their evaluations of the Accused between 30 June 2009 and the present and to order the mental health professionals to give the prosecution access to their notes from 30 June 2009 to the present.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2).

FACTS

The Accused is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030(a)(1), and five specifications of violating a lawful general regulation, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Charge Sheet.

On 3 July 2012, the defense sent the prosecution their initial Article 13 witness list. The defense requested that the prosecution produce numerous mental health professionals, as well as the Accused to discuss the conditions under which he was kept at Quantico. See AE CLXXXI (Defense Requested Witnesses: Article 13 Motion, dated 3 July 2012). Specifically, the defense requested the following mental health professionals for the following reasons:

"Capt. Hocter will testify that he gave weekly status reports stating that he felt the POI precautions were unnecessary." Id.

"[COL Malone] will testify that the Quantico Brig instituted more precautions than he would from a psychiatric perspective. He will testify that he consistently recommended to the Quantico Brig to remove PFC Manning from POI status. He will testify that if PFC Manning were not in custody, he would have

recommended routine outpatient care for him. He will testify that it has long been known that restriction of environmental and social stimulation has a negative effect on mental function. He will testify that PFC Manning's restrictive confinement was not necessary from a psychiatric perspective, and that he made repeated recommendations that the PFC Manning's status should be downgraded." Id.

"[LCDR Moulton] will testify that isolation or solitary confinement is among the most harmful conditions that can be imposed upon a detainee. He will also testify how PFC Manning was held in restrictive solitary confinement for nearly a year without any psychiatric or behavioral justification. Finally, he will testify how these conditions likely placed PFC Manning at an increased risk of exacerbating any existing psychiatric symptomatology or condition." Id.

The prosecution conducted cursory interviews of the defense requested mental health professionals to make an RCM 703 determination for the purpose of the prosecution's 10 July 2012 response, but did not go into any detail regarding the mental health professionals' evaluation or diagnosis of the Accused. All the mental health professionals that the government spoke with were authorized by the defense to respond to the government's limited questioning.

On 10 July 2012, the government responded to the defense's witness list request and agreed to produce all the requested mental health professionals. See AE CXCXV (Government Response to Defense Article 13 Witness Request, dated 10 July 2012).

On 27 July 2012, the defense filed their Article 13 motion. In it, the defense addresses, among other things, the Accused's placement on Prevention of Injury (POI) status at the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF). The motion discusses the Accused's interactions with the Accused's mental health professionals, and their recommendations as to whether the Accused should or should not be on POI status, as well as the Accused's interactions with staff personnel and their determinations that the Accused should remain on POI status. The defense also attached to the motion the Accused's MCBQ Suicide Risk/Prevention of Injury Assignment Reviews, beginning on 30 July 10, as well as observation and evaluation notes and Classification and Assignment Review documentation, which contains reports and reviews from both MCBQ personnel and mental health professionals. In addition, the defense's motion contains affidavits from CAPT Hocter and COL Malone. See Defense Article 13 Motion, attachments 2, 7, & 8.

Recently, the prosecution attempted to reach out to additional mental health professionals seen by the Accused during his time in the Kuwait Confinement Facility and at the MCBQ that were not listed as defense witnesses--CAPT Richardson, LTC Russell, and LCDR Weber. The prosecution reached LTC Russell and asked some cursory questions, but has not been able to speak with CAPT Richardson and LCDR Weber. The prosecution has not even been able to get contact information for CAPT Richardson without a waiver from defense or a Court order. See Enclosure 2. In refusing to provide a phone number for CAPT Richardson, the Staff Judge Advocate at the Naval Hospital Camp Pendleton, informed the prosecution of the following:

It is Naval Hospital Camp Pendleton's position that an interview of any of our healthcare providers requires a judge signed order authorizing the release of protected healthcare information, absent a HIPAA release from our patient/the accused. These requirements are contained in the attached DOD regulation 6025.18R:

"C7.5.1. Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
C7.5.1.1. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;"

See Enclosure 2; see also Department of Defense Directive (DoDD) 6025.18-R, DOD Health Information Privacy Regulation (24 January 2003), C7.5. Standard: Disclosures for Judicial and Administrative Proceedings. The Staff Judge Advocate at Camp Pendleton also emailed a copy of the Directive.

On 14 August 2012, the prosecution emailed the defense their Article 13 witness list, which listed CAPT Richardson, LTC Russell, and LCDR Weber. The prosecution also asked the defense if they could obtain a HIPAA release from the Accused to enable the prosecution to speak with the Accused's mental health providers and reminded the defense that they had mentioned in chambers that they would not have an issue providing a waiver. See Enclosure 1. Based on the information from the Staff Judge Advocate at the Naval Hospital Camp Pendleton, the prosecution forwarded the defense DoD 6025.18-R, DoD Health Information Privacy Regulation. See Enclosure 3. The defense responded that the prosecution had already spoken with the defense witnesses. See Enclosure 1.

On 15 August 2012, the prosecution informed the defense that most of the mental health professionals only answered very specific questions and did not go into detail. The prosecution further informed the defense that two mental health professionals the Accused saw in Kuwait, CAPT Richardson and LCDR Weber, were on the government's witness list, and they required a written waiver to speak with the prosecution. See Enclosure 1. The defense responded that "The Government should ask whatever questions it wants of the Defense listed witnesses, and then renew its request with specificity regarding the questions the Defense witnesses refused to answer." See Enclosure 1. The prosecution responded that the two witnesses on the prosecution's witness list would not speak to the prosecution without a waiver or court order and that the prosecution had not been able to ask pertinent questions based on what the defense alleged in their Article 13 motion. See Enclosure 1.

The defense informed the prosecution, "You will need to request a Court Order." See Enclosure 1.

The prosecution is calling CAPT Richardson based on medical records the prosecution received during the course of the investigation. See Enclosure 4. CAPT Richardson is a psychiatrist who assessed the Accused between 2 July 2010 and 28 July 2010, when the Accused

was confined in Kuwait. CAPT Richardson will testify to the Accused's suicidal ideations, specifically that he determined the following regarding the Accused:

Immediate risk of self harm is still considered to be elevated/high due to his poor reliability, inability or lack of desire to adequately express thoughts in regards to SI [suicidal ideations], not contracting for safety, having made a noose and gathered items that had potential to harm self. Additionally, his regressed behavior and poor ego strength exacerbate the risk.

See Enclosure 4 at 00000910. CAPT Richardson suggested that the Accused transfer to another facility with better resources to manage the complexities of the Accused's condition. See Enclosure 4. CAPT Richardson will testify that the Accused's assessed suicide risk was elevated or high during the duration of his stay at the Kuwait Confinement Facility. See Enclosure 4. CAPT Richardson noted that the Accused claimed that he would not harm himself but likely made the statements because the Accused wanted a change in uniform and in status. See Enclosure 4 at 00000883-84. CAPT Richardson based his determination on the Accused's poor reliability and inconsistency, having made two nooses and being deceitful about them, saying he would be "patient," and saying he would kill himself if he knew he could be successful. Id. CAPT Richardson also based his determination on the Accused's fragile ego, which could easily decompensate. Id.

The prosecution is calling LCDR Weber based on medical records the prosecution received during the course of the investigation. See Enclosure 4. LCDR Weber is a psychologist who assessed the Accused between 6 July 2010 and 27 July 2010, when the Accused was confined in Kuwait. LCDR Weber will testify to the Accused's suicidal ideations, specifically that she determined the following regarding the Accused: "Immediate risk for self harm or harm to others is considered to be elevated/high." See Enclosure 4 at 00000902. This assessment continued throughout the entirety of the assessments which ended in 27 July 2010. See Enclosure 4 at 00000872.

Medical records and MCBQ forms reveal that the records from the Kuwait Medical Facility were communicated to the MCBQ. See, e.g., Defense Article 13 Motion, attachment 1.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the charge sheet and the listed enclosures.

LEGAL AUTHORITY AND ARGUMENT

In general, unlimited access to mental health records of an Accused by the prosecution is prohibited. See Military Rule of Evidence (MRE) 513; DoDD 6025.18-R.

MRE 513 establishes a privilege between a patient and his psychotherapist if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. MRE 513(a). DoDD 6025.18-R establishes when protected

health information can be disclosed and used. Both protections, however, contain exceptions because mental health records are discoverable when relevant and material to the charges.

DoDD 6025.18-R permits disclosures in response to, among other things, a court order. See DoDD 6025.18-R, C7.5.1.1.

MRE 513(b)(7) articulates the following exception to the MRE 513 privilege:

"[t]here is no privilege . . . when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice"

The defense has made the POI status of the Accused the focus of the Article 13 motion and at the same time will not allow the prosecution access to the witnesses or information that would explain why the Accused was on POI status and why, instead of trying to punish the Accused as the defense alleges, the MCBQ staff was trying to ensure that the Accused did not harm himself. For example, the defense alleges that, in violation of their internal policies, the Duty Brig Supervisor placed the Accused in MAX custody, citing the Accused's previous suicide watch in Kuwait. See Defense Article 13 Motion, paragraph 10. This was approved by the PCF Commander, who also determined that the Accused should be placed under special handling instructions of Suicide Risk (SR). Id. However, the defense proposes not to allow the government to ascertain the information that was communicated to Brig personnel and upon which they based this determination.

In its Article 13 motion, the defense has, in essence, offered the Accused's mental condition as a defense to why the Accused should not have been on POI status. See Defense Article 13 Motion. The defense is putting the Accused's mental condition at issue under circumstances not covered by RCM 706 or MRE 302 and then proposes to only allow the prosecution enough access to the Accused's mental health history to establish the points that the defense would like to establish--that there was a period of time when particular mental health professionals did not believe that the Accused was suicidal--and block the prosecution from accessing the mental health professionals and information that potentially establish, at least in part, the basis for the MCBQ personnel's decisions. By trying to limit the discussion to only the facts that are potentially helpful to the defense, the defense is deliberately providing the Court with only a small portion of the information that would be material to its decision.

Significantly, CAPT Richardson noted in the Accused's medical records that appear to have been reviewed by MCBQ personnel and mental health professionals (based on the notations in the MCBQ paperwork), that he believed the Accused changed his statements to mental health professionals regarding his suicidal ideations because he wanted to change his uniform and have less restrictions. CAPT Richardson and LCDR Weber both assessed the Accused's risk of committing suicide as elevated or high during the duration of his stay in Kuwait. Again, in the interest of justice, to ensure that the Court has an complete understanding the Accused's behavior

and history of suicidal ideations, the Court should determine that the MRE 513 privilege does not apply to the Accused's mental health information IAW MRE 513(b)(7).

In addition, the defense has waived the privilege. IAW MRE 510, a person waives a privilege by voluntarily disclosing or consenting to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. MRE 510.

Here, the Accused has waived the privilege insofar as he has provided affidavits from his mental health professionals regarding their treatment of the Accused and is calling his mental health professionals to testify about their assessments of the Accused. Again, the Accused cannot only waive the privilege for the portions of testimony and records that are potentially helpful to him (i.e., testimony that the Accused was not having suicidal ideations), but exclude the records and testimony that provide the basis for his POI classification.

The prosecution should not only be permitted to fully explore the assessments completed by LTC Russell, LCDR Weber, and CAPT Richardson, but should also be permitted to completely explore the bases for the recommendations of CAPT Hoyer and COL Malone. Specifically, the prosecution should be permitted to explore the reasons behind CAPT Hoyer's and COL Malone's recommendations that the Accused be placed on and removed from POI status and how their reasons may agree with or differ from the mental health professionals and MCBQ staff that deemed the Accused a suicide risk. The prosecution should also be able to explore why CAPT Hoyer and COL Malone believed that mental evaluation was necessary despite recommending he be removed from POI status, and why CAPT Hoyer documented on his Suicide Risk/Prevention of Injury Assignment Reviews that he believed that the Accused may have to be segregated from the general population for other reasons. The prosecution should be able to explore the reasons for the diagnoses and how what the mental health professional see and evaluate differs from what the MCBQ personnel see and how they interpret it. For example, in defense's motion, they cite an affidavit obtained from CAPT Hoyer which notes that the MCBQ generally keeps patients on precautions longer than he recommends. See Defense Article 13 Motion, attachments 7 & 8.

In addition, the prosecution should be able to explore why COL Malone checked the box on one of his Suicide Risk/Prevention of Injury Assignment Reviews that the Accused did not pose a threat to himself but noted that the Accused remained at moderate risk of self harm and why COL Malone noted that the Accused's suicide risk was moderate to high but then decreased. The prosecution should also be able to explore COL Malone's notation that the Accused made "provocative statements" and if other MCBQ staff could have interpreted as suicidal ideations. The prosecution should also be able to explore the differences between LTC Robert Russell's recommendations and COL Malone's recommendations when both completed Suicide Risk/Prevention of Injury Assignment Reviews of the Accused during the same time period, with one determining that the Accused was a suicide risk and one determining that the Accused was not a suicide risk. See Defense Article 13 Motion, attachment 2.

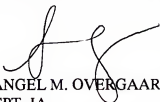
All notes and testimony documenting the Accused's prior suicidal ideations and any behavior that could be interpreted as suicidal by MCBQ personnel is material to the

understanding of why the Accused remained on POI status. This is, therefore, the type of situation that MRE 510 is designed to cover, as justice would not allow for the defense to pick and choose which parts of his mental health history are not privileged, thereby allowing only the potentially helpful portions to be disclosed and not revealing the entire picture for the Court.

Because the prosecution has not been able to ascertain necessary information from mental health professionals without a court order or a waiver from the Accused and the Accused will not sign a waiver, the prosecution requests a court order to obtain relevant information. To expedite the proceedings and prevent the government from having to request any supplemental orders from the Court, the prosecution requests that the order apply to all mental health professionals from 30 June 2009 to the present day and all mental health records. See Enclosure 5.

CONCLUSION

The prosecution requests that, in the interest of justice, this Court issue an order to enable the Accused's mental health professionals to speak with the prosecution regarding their evaluations of the Accused between 30 June 2009 and the present, and to order the mental health professionals to give the prosecution access to their notes from 30 June 2009 to the present.



ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense counsel on 16 August 2012.



ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

5 Encls

1. Email Re: Article 13 Witness List
2. Email Re: HIPAA Requirement
3. DoD 6025.18-R, C7.5
4. Accused Medical Records
5. Draft Court Order

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Motion

for Court Order
for Mental Health Professionals

Enclosure 1

16 August 2012

From: David Coombs
To: Fein, Ashden MAJ USARMY MDW (US)
Cc: "Hurley, Thomas F MAJ OSD OMC Defense"; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)
Subject: RE: Article 13 Witness List
Date: Wednesday, August 15, 2012 9:50:04 AM

Ashden,

You will need to request a Court Order.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]
Sent: Wednesday, August 15, 2012 9:47 AM
To: David Coombs
Cc: "Hurley, Thomas F MAJ OSD OMC Defense"; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)
Subject: RE: Article 13 Witness List

David,

Thank you. As for the two witnesses on the government's witness list, they will not speak with us without a waiver or court order. Will the defense be willing to obtain a waiver so that we may speak with these witnesses or will the defense require the United States to request a Court order? These doctors fall into the same category of the doctors from Quantico that are on the defense's witness list, and currently we are unable to ask them pertinent questions based on what the defense has alleged in your Article 13 motion.

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]

Sent: Wednesday, August 15, 2012 9:41 AM

To: Fein, Ashden MAJ USARMY MDW (US)

Cc: 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)

Subject: RE: Article 13 Witness List

Ashden,

1. I disagree with your interpretation of whether the Defense can simply adopt the Government listed witnesses.
2. I disagree that Touhy would apply to a Defense witness listed for a court-martial. I agree that all of the Government listed witnesses are Department of Defense witnesses.
3. There is no need for a RCM 703 determination. The Government should ask whatever questions it wants of the Defense listed witnesses, and then renew its request with specificity regarding the questions the Defense witnesses refused to answer.

Best,

David

David E. Coombs, Esq.

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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]

Sent: Wednesday, August 15, 2012 9:26 AM

To: David Coombs

Cc: 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)

Subject: RE: Article 13 Witness List

David,

For this witness list, we used our standard language and below is a brief response to your email.

1. The United States intends to call all the listed witnesses, but our decision could change based on many factors. To ensure the production of a witness, the defense must comply with RCM 703(c) and Rockwood.
2. Although Touhy always applies, these government employees do not require further coordination because they are employed through the Department of Defense; therefore, it is not necessary.
3. Although all of the medical professionals from the defense witness list spoke to us, most of them only answered very specific questions and did not go into much detail- enough for the prosecution to make determinations under RCM 703. We added CAPT Richardson and LCDR Weber, who are both mental health professionals that saw the accused in Kuwait, to the government's witness list, and they require a written waiver.

Thank you!

v/r

Ashden

-----Original Message-----

From: David Coombs [<mailto:coombs@armycourt martialdefense.com>]
<[mailto:\[mailto:coombs@armycourt martialdefense.com\]](mailto:[mailto:coombs@armycourt martialdefense.com])>

Sent: Tuesday, August 14, 2012 9:06 PM

To: Fein, Ashden MAJ USARMY MDW (US)

Cc: 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)

Subject: RE: Article 13 Witness List

Ashden,

I do not understand a witness list where the Government states it "may" call a certain witness. Are these individuals being called by the Government or not? Additionally, the Defense does not need to comply with Rockwood or RCM 703 if it is simply adopting the Government's witness list. If the Government elects not to call a certain witness, then you must provide us with timely notice of this fact.

I also do not understand what you mean by stating there may be a need to comply with Touhy. Finally, which Defense listed witness indicated that you needed a HIPPA release? From speaking with my witnesses, they informed me that you had already interviewed them.

Best,

David

David E. Coombs, Esq.

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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [<mailto:ashden.fein.mil@mail.mil>]
<[mailto:\[mailto:ashden.fein.mil@mail.mil\]](mailto:[mailto:ashden.fein.mil@mail.mil])>

Sent: Tuesday, August 14, 2012 8:54 PM

To: David Coombs

Cc: 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Overgaard, Angel M CPT USARMY (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US)

Subject: Article 13 Witness List

David,

Attached is the government's Article 13 witness list. According to the legal advisors to the health care providers on our witness list and some of the doctors on the defense's witness list, we are required to obtain a HIPAA release from the accused or a Court order, before speaking with the providers. You mentioned in chambers that the defense would not have an issue providing this waiver, if it became an issue. Could you please assist with providing the government with the HIPAA release so we can continue preparing our response. Additionally, attached is DoD 6025.18r, DoD Health Information Privacy Regulation, which we were provided by the health care attorneys.

Thank you!

v/r

Ashden

[illegible]

1

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)
)
)
)

16 August 2012

Overgaard, Angel M CPT USARMY (US)

Subject: FW: HIPAA requirements

-----Original Message-----

From: Eichenmuller, Jennifer LCDR [mailto:Jen.Eichenmuller@med.navy.mil]
Sent: Tuesday, August 14, 2012 7:32 PM
To: Fein, Ashden MAJ USARMY MDW (US)
Cc: von Elten, Alexander S (Alec) CPT USARMY (US); Mendoza, Edgardo D CIV (US)
Subject: HIPAA requirements

Major Fein,
It is Naval Hospital Camp Pendleton's position that an interview of any of our healthcare providers requires a judge signed order authorizing the release of protected healthcare information, absent a HIPAA release from our patient/the accused. These requirements are contained in the attached DOD regulation 6025.18R:

"C7.5.1. Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

C7.5.1.1. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;" ...

I hope this is helpful.

Sincerely,

Jennifer Eichenmuller
LCDR, JAGC, USN
Staff Judge Advocate
Naval Hospital Camp Pendleton, Bldg H-100 Box 555191, Santa Margarita Road Camp Pendleton, CA 92055
PH: 760-725-1266
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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]
Sent: Tuesday, August 14, 2012 12:37 PM
To: Hill, Steven P CIV; Mendoza, Edgardo CIV
Cc: von Elten, Alexander S (Alec) CPT USARMY (US); Eichenmuller, Jennifer LCDR; Mendoza, Edgardo CIV; Cueto, Gorgonia CIV

Subject: RE: Assistance

Thank you; however we are not needing to request him be a witness, just contact information so we can simply ask him a few questions to determine whether we need him to be a witness for a US Army court-martial. Could we please be provided a personal cell number, now that he has retired so we can reach out?

Unfortunately, our witness list is due tonight and we just need to ask a few questions to determine whether he is the appropriate witness. Thank you!

v/r
MAJ Fein

-----Original Message-----

From: Hill, Steven P CIV [mailto:Steven.Hill@med.navy.mil]
Sent: Tuesday, August 14, 2012 3:35 PM
To: Mendoza, Edgardo D CIV (US); Fein, Ashden MAJ USARMY MDW (US)
Cc: von Elten, Alexander S (Alec) CPT USARMY (US); Eichenmuller, Jennifer LCDR; Mendoza, Edgardo D CIV (US); Cueto, Gorgonia S CIV (US)
Subject: RE: Assistance

MAJ,

Good afternoon. The attached is provided for your use. I will ensure the SJA (LCDR Eichenmuller) is aware of this issue as soon as she steps back into the office.

r/

Steven P. Hill
LNCM(SW)/E9, USN-Retired
Office Manager
Legal Department
Naval Hospital, Bldg H-100
Box 555191, Santa Margarita Rd
Camp Pendleton, CA 92055
(Tel) 760-725-1539
(Fax) 760-725-0603
steven.hill@med.navy.mil

ATTORNEY WORK PRODUCT

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-----Original Message-----

From: Mendoza, Edgardo CIV
Sent: Tuesday, August 14, 2012 12:18 PM
To: ashden.fein.mil@mail.mil
Cc: alexander.s.vonelten.mil@mail.mil; Hill, Steven P CIV
Subject: RE: Assistance

Major Fein,

I am ccing Mr. Hill, who is a staff at the legal department.

R/
Ed Mendoza
Secretary, Mental Health Department
Naval Hospital Camp Pendleton
WP: 760-725.1504
" Failure to plan is a plan to fail "
- Anonymous

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-----Original Message-----
From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]
Sent: Tuesday, August 14, 2012 11:40 AM
To: Mendoza, Edgardo CIV
Cc: von Elten, Alexander S (Alec) CPT USARMY (US)
Subject: RE: Assistance
Importance: High

Mr. Mendoza,

Do you have another SJA or CO that we could speak with? Our filing is due TODAY and no one is answering the phone or email with your SJA. Thank you!

v/r
MAJ Fein

-----Original Message-----
From: Mendoza, Edgardo CIV [mailto:Edgardo.Mendoza@med.navy.mil]
Sent: Monday, August 13, 2012 12:06 PM
To: Fein, Ashden MAJ USARMY MDW (US)
Cc: von Elten, Alexander S (Alec) CPT USARMY (US)
Subject: RE: Assistance

Major Fein,

Please call our legal department, POC LCDR Jennifer Eichenmuller at 760-725-1266 or email jen.eichenmuller@med.navy.mil.
She is our SJA. Thank you.

R/
Ed Mendoza
Secretary, Mental Health Department
Naval Hospital Camp Pendleton
WP: 760-725.1504
" Failure to plan is a plan to fail "
- Anonymous

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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]
Sent: Monday, August 13, 2012 8:37 AM
To: Mendoza, Edgardo CIV
Cc: von Elten, Alexander S (Alec) CPT USARMY (US)
Subject: RE: Assistance

By the way- this information is for the court-martial of PFC Bradley Manning, the "Wikileaks" Soldier.

-----Original Message-----

From: Mendoza, Edgardo CIV [mailto:Edgardo.Mendoza@med.navy.mil]
Sent: Monday, August 13, 2012 11:32 AM
To: Fein, Ashden MAJ USARMY MDW (US)
Subject: RE: Assistance

Major Fein,

I will forward this email to my dept head and will get back with ASAP.

R/
Ed Mendoza
Secretary, Mental Health Department
Naval Hospital Camp Pendleton
WP: 760-725.1504
" Failure to plan is a plan to fail "
- Anonymous

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-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US) [mailto:ashden.fein.mil@mail.mil]
Sent: Monday, August 13, 2012 8:30 AM
To: Mendoza, Edgardo CIV
Cc: von Elten, Alexander S (Alec) CPT USARMY (US)
Subject: Assistance

Mr. Mendoza,

I am a US Army prosecutor with the US Army Military District of Washington. We are looking for contact information for CAPT Richardson, who could be a potential witness in our pending court-martial. Please send any contact information you may have. Thank you.

v/r

Ashden Fein
Major, US Army
202-685-4572 (direct/STE)
202-685-1975 (office)

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Motion

for Court Order
for Mental Health Professionals

Enclosure 3

16 August 2012



DoD 6025.18-R

DoD HEALTH INFORMATION PRIVACY REGULATION

JANUARY 2003

ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS

C7.5. STANDARD: DISCLOSURES FOR JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

C7.5.1. Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

C7.5.1.1. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

C7.5.1.2. In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

C7.5.1.2.1. The covered entity receives satisfactory assurance, as described in subparagraph C7.5.1.3., from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

C7.5.1.2.2. The covered entity receives satisfactory assurance, as described in subparagraph C7.5.1.4., from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of subparagraph C7.5.1.5. of this section.

C7.5.1.3. For the purposes of subparagraph C7.5.1.2.1., a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

C7.5.1.3.1. The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

C7.5.1.3.2. The notice included sufficient information about the litigation or proceeding for which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

C7.5.1.3.3. The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

C7.5.1.3.3.1. No objections were filed; or

C7.5.1.3.3.2. All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

C7.5.1.4. For the purposes of subparagraph C7.5.1.2.2., a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

C7.5.1.4.1. The parties to the dispute concerning the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

C7.5.1.4.2. The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

C7.5.1.5. For purposes of paragraph C7.5.1., a qualified protective order concerning the protected health information requested under paragraph C7.5.2., is an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

C7.5.1.5.1. Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

C7.5.1.5.2. Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

C7.5.1.6. Notwithstanding subparagraph C7.5.1.2., a covered entity may disclose protected health information in response to lawful process described in subparagraph C7.5.1.2. without receiving satisfactory assurance under subparagraphs C7.5.1.2.1. or C7.5.1.2.2., if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of subparagraph C7.5.1.3. or to seek a qualified protective order sufficient to meet the requirements of subparagraph C7.5.1.4.

C7.5.2. Other Uses and Disclosures Under This Chapter. The provisions of this section do not supersede other provisions of this Chapter that otherwise permit or restrict uses or disclosures of protected health information.

C7.5.3. Relationship to Privacy Act Disclosures Pursuant to the Order of a Court of Competent Jurisdiction. Under 5 U.S.C. 552a(b)(11) (reference (c)), a Federal Agency may disclose Privacy Act-protected information pursuant to the order of a court (i.e., an order that has been reviewed and approved by a judge) of competent jurisdiction. In certain cases, the authority to disclose protected health information in response to an order of a court or administrative tribunal may be broader than the related authority under the Privacy Act (reference (c)). In such cases, other Privacy Act rules and procedures, such as the establishment of a routine use permitting disclosure, and where compulsory legal process is concerned, notification of the individual when the process becomes a matter of public record, may also apply. As stated in section C2.6., a disclosure of protected health information must be in accord with both this Regulation and the Privacy Act and its implementing Regulation (references (c) and (d)).

C7.5.4. Administrative or Judicial Proceedings in Relation to Courts-Martial Procedures. Any order from a military judge in connection with any process under the Uniform Code of Military Justice (reference (v)) is an order covered by subparagraph C7.5.1.1.

C7.6. STANDARD: DISCLOSURES FOR LAW ENFORCEMENT PURPOSES

A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs C7.6.1. through C7.6.6. are met, as applicable.

C7.6.1. Permitted Disclosures: Pursuant to Process and as Otherwise Required By Law. A covered entity may disclose protected health information:

C7.6.1.1. As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to subparagraph C7.2.1.2. (reports of child abuse and neglect) or C7.3.1.1. (reports required by law of abuse, neglect or domestic violence); or

C7.6.1.2. In compliance with and as limited by the relevant requirements of:

C7.6.1.2.1. A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

C7.6.1.2.2. A grand jury subpoena; or

Appellate Exhibit 269
Enclosure 4
46 pages
ordered sealed for Reason 4
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

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UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

XX August 2012

TO: PFC Manning's Mental Health Professionals

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which it is required to provide in the interests of justice.

2. You are directed to respond to all questions asked by the prosecution team in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC Manning and to produce any requested mental health records of PFC Bradley Manning, including notes, from 30 June 2009 to the present.

3. Coordinate with the prosecution team in United States v. PFC Manning to effect delivery of the notes and records.

4. Should the requirements of this court order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this ____ day of August 2012.

Denise Lind
Colonel, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Prosecution Notification
to the Defense of
Statements under RCM 914

3 August 2012

1. On 26 July 2012, the Court ordered the prosecution to notify the defense what types of pre-trial statements the prosecution intends to disclose to the defense under Rule for Courts-Martial (RCM) 914. RCM 914 states as follows:

After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is: (1) [i]n the case of a witness called by the trial counsel, in the possession of the United States; or (2) [i]n the case of a witness called by the defense, in the possession of the accused or defense counsel.

RCM 914(a); see also RCM 914, analysis (the rule is based on the Jencks Act, 18 U.S.C. § 3500). The "rule is not intended to provide a general right of discovery, but 'to prevent a party from gaining an unfair advantage in the trial arena by withholding evidence that could impeach that party's witness.'" United States v. Parks, 2009 WL 6841857 (A.C.C.A. 2009) (citing United States v. Lewis, 38 M.J. 501, 508 (A.C.M.R. 1993)). RCM 914 applies at trial; nevertheless, "the rule is not intended to discourage voluntary disclosure before trial, even where RCM 701 does not require disclosure, so as to avoid delays at trial." RCM 914, analysis.

2. RCM 914(f) defines what qualifies as a "statement." See RCM 914(f). Statements include written or electronic records signed, initialed, or otherwise adopted by a witness, e-mails sent by a witness, transcriptions or recordings of an oral statement made contemporaneously with the making of that statement and consisting of a substantially verbatim recital of that statement, testimony given in an Article 32 investigation or grand jury proceeding, and other "statements which could properly be called the witness' own words." Parks, 2009 WL 6841857 (citing Palermo v. United States, 360 U.S. 343, 352 (1959)); see also United States v. Holmes, 25 M.J. 674 (A.F.C.M.R. 1987) (information a witness told an investigator, compiled outside the witness' presence and after-the-fact, is not a "statement" under RCM 914); see also United States v. Staley, 36 M.J. 896, 898 (A.F.C.M.R. 1993) (recordings or transcripts of testimony before an administrative discharge board are subject to RCM 914).

3. RCM 914 applies only to materials in the possession of the prosecutorial arm of the United States. See United States v. Ali, 12 M.J. 1018, 1019 (A.C.M.R. 1982); see also United States v.

APPELLATE EXHIBIT 270
PAGE REFERENCED
PAGE OF PAGES

Gomez, 15 M.J. 954, 964 (A.C.M.R. 1983); United States v. Calley, 1973 A.C.M.R. 14570 (statements given to Congress are not subject to Jencks); RCM 914, analysis. In Ali, the court held that statements submitted to a company commander engaged in the prosecutorial function were statements within the meaning of Jencks, but that statements submitted to the charge of quarters, albeit a representative of the commander but who was not engaged in the prosecutorial function, was not within the Jencks Act. See Ali, 12 M.J. at 1019; see also Calley, 1973 A.C.M.R. 14570 (the phrase "the United States" is used "in a functional, prosecutorial sense").

4. The prosecution proposes the following process to search for, preserve, and disclose material under RCM 914:

a. For all witnesses, the prosecution will search its records, and will request that investigative agencies search their records, for any statements that the prosecution reasonably expects will relate to the subject matter of each witness's anticipated testimony on direct examination. The prosecution will disclose such statements in accordance with the filing date set by the Court.

b. For any potential rebuttal witness, the prosecution will preserve any applicable statements and timely disclose those statements under RCM 914 should the witness testify.

5. The prosecution understands its continuing obligation to provide material under RCM 914.



J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Prosecution Notification
to the Court**

25 July 2012

The United States responds to the Court's Order, dated 22 June 2012, Appellate Exhibit CXLVII, as follows:

1. **Military Authorities.** The prosecution anticipates that the military authorities that are custodians of classified evidence that is the subject of the Defense's Motion to Compel will not claim a privilege IAW MRE 505(c) for the classified information that is due to the Court on 3 August 2012.¹
2. **FBI.** The prosecution anticipates the appropriate Senior Official, on behalf of the FBI, will seek limited disclosure IAW MRE 505(g)(2) and will not claim a privilege IAW MRE 505(c) for classified information.



ASHDEN FEIN
MAJ, JA
Trial Counsel

¹ This notification does not include any of the military authorities for which the prosecution has received a delay.

APPELLANT EXHIBIT 271
PAGE 11 OF 11
DATE 07/25/12

UNITED STATES OF AMERICA)

v.)

**Prosecution Notification
to the Court**

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

20 July 2012

The United States responds to the Court's Order, dated 22 June 2012, Appellate Exhibit CXLVII, as follows:

The prosecution sought out and identified files regarding the accused under the possession, custody, or control of military authorities that were the subject of the Defense Motion to Compel 2, Appellate Exhibit XCVI. Specifically, the prosecution coordinated with DOD, HQDA, CID, DIA, DISA, CENTCOM, SOUTHCOM, and CYBERCOM. The prosecution notifies the Court of the status of whether the custodian of classified evidence for the following entities will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control.

(1) **HQDA, DOD, CENTCOM, DISA, and SOUTHCOM.** The prosecution anticipates the appropriate Senior Official of the Intelligence Community, on behalf of these organizations and commands, will seek limited disclosure IAW MRE 505(g)(2) and will not claim a privilege IAW MRE 505(c) for classified information. On 19 July 2012, the Court granted the prosecution an extension to respond for the information classified above the secret level or containing specialized control measures.

(2) **CID.** The prosecution already disclosed all CID information, and will continue to disclose any additional information as CID continues to receive additional information.

(3) **DIA.** The prosecution anticipates DIA will seek limited disclosure IAW MRE 505(g)(2) and will not claim a privilege IAW MRE 505(c) for classified information. On 19 July 2012, the Court granted the prosecution an extension to respond for the information classified above the secret level or containing specialized control measures.

(4) **CYBERCOM.** On 19 July 2012, the Court granted the prosecution an extension to respond for all CYBERCOM information.


ASHDEN FEIN
MAJ, JA
Trial Counsel

APPELLATE EXHIBIT 272
PAGE REFERENCED
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1

(2) On 31 May 2012, the Government notified Defense that the FBI conducted an Impact Statement for which the Government intends to file an *ex parte* motion under MRE 505(g)(2).

b. DSS – Defense alleges Government has disclosed only items charged in specification 14 of Charge II and moves to compel DSS files dealing with Specifications 12 and 13 of Charge II. Government states it has disclosed the entire file.

c. DOS – Defense moves to compel:

(1) Chief of Mission review of released cables at affected posts concerning their initial assessment as well as their opinion regarding the overall effect that WikiLeaks release could have on relations with the host country, if any. The Chiefs of Mission produced written assessments of the leaked cables based upon their independent review. These written submissions were then used to formulate a portion of the draft damage assessment completed in August of 2011;

(2) WikiLeaks Working Group documents – particularly written Situation Reports approximately twice a week during the groups time period of operation roughly from 28 November 2010 until 17 December 2010.

(3) Mitigation Team documents – particularly written minutes of its meetings and written agendas for it work. Part of the Mitigation Team's efforts concentrated on counterterrorism concerns;

(4) The Persons at Risk Group Information Memorandum for the Secretary of State, matrix to track identified individuals, and formal guidance to all embassies concerning the Department of States' efforts and authorized actions for any identified person at risk;

(5) Information collected by the Director of the Office of Counterintelligence within the Department of State regarding any possible impact from the disclosure of diplomatic cables intended to possibly be used to update the August 2011 draft damage assessment; and

(6) The Department of State's reporting to Congress to include any prepared written statement for Congressional testimony on 7 and 9 December 2010 and Congressional testimony by Ambassador Patrick Kennedy's testimony on 11 March 2011 for members of the House of Representatives and the Senate and the House Permanent Select Committee on Intelligence, and DOS reports to Congress concerning any effect caused by WikiLeaks disclosure and steps undertaken to mitigate them, de 2 briefings for members of the House of Representatives and the Senate in December 2010.

On 8 June 2012, the Court granted the Government's request for 30 days to determine whether the above records exist. On 9 July 2012, the Government will notify the Court whether such records exist and file a supplemental response to the Defense Motion to Compel Discovery for those records that do exist.

d. DOJ – documents related to the investigation of PFC Manning and WikiLeaks.

e. CIA – internal investigation or damage assessment.

f. ODNI – Internal Review of DOS cables.

g. ONCIX – Documents related to PFC Manning or WikiLeaks. The Government has provided 12 pages of *Brady* material. On 31 May 2012, the Government provided notice to the Court that ONCIX has a draft damage assessment with a coordinated version complete approximately 13 July 2012 and agreed to provide the draft damage assessment to the Court for *in camera* review.

4. Brady material from the Interagency Committee Review, President's Intelligence Advisory Board, House of Representative's Oversight Committee;

5. All evidence intended for use in the Government case-in-chief obtained from DA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX.

6. All aggravation evidence the Government intends to introduce in sentencing from DA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX.

7. The entire CID, DIA, DISA, and CENTCOM, and SOUTHCOM files related to PFC Manning, WikiLeaks, and/or the damage occasioned by the leaks to include documents, reports, analyses, files, investigations, letters, working papers, and damage assessments. Defense alleges they are material to the preparation of the defense as they will show, what, if any damage was caused by the leaks.

8. Interagency Committee Review: The results of any investigation or review concerning the alleged leaks by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Defense alleges Mr. Travers was asked to lead a comprehensive effort to review the alleged leaks.

9. President's Intelligence Advisory Board: Any report or recommendation concerning the alleged leaks by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board.

10. House Representatives Oversight Committee: The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks, the actions of Attorney General Eric Holder, and the investigation of PFC Manning.

Defense further moved the Court to require the Government to state with specificity the steps it has taken to comply with RCM 701(a)(6). This issue will be addressed at the Article 39(a) session on 25 June 2012.

The Law:

1. The Due Process Clause of the Fifth Amendment requires the Government to disclose evidence that is material and favorable to the defense, *Brady v. Maryland*, 373 U.S. 83 (1963).
2. Discovery in the military justice system is governed by Article 46, UCMJ, providing equal opportunity for the parties to obtain witnesses and evidence, and RCM 701, implementing Article 46. These rules provide broader discovery that required by *Brady* Constitutional standard. *U.S. v. Williams*, 50 M.J. 46 (C.A.A.F. 1999); *U.S. v. Simmons*, 38 M.J. 376 (C.M.A. 1993), *U.S. v. Behenna*, 70 M.J. 521 (Army Ct. Crim. App. 2011); *U.S. v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010). RCM 701(a)(6) requires that trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused of an offense charged; reduce the degree of guilt of the accused of an offense charges; or reduce the punishment. RCM 701(a)(2) requires the trial counsel, after service of charges, upon request of the defense, to permit the defense to inspect any books, papers, documents, photographs, tangible objects, buildings or places which are within the possession, custody, or control of military authorities and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial or were obtained from or belonged to the accused. The Court of Appeals for the Armed Forces has interpreted RCM 701(a)(2) to require trial counsel to disclose to the defense discoverable information regardless of when the Government intends to use it. *U.S. v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).
3. The Government has a due diligence duty to search for discoverable information both under *Brady* and RCM 701. The scope of the prosecution's requirement to search government files beyond the prosecutor's own files for discovery under RCM 701 and *Brady v. Maryland*, 373 U.S. 83 (1963) is generally limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution, and (3) other files, as designated in a defense discovery request that involved a specified type of information within a specified entity. The parameters of the review depends on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. The outer parameters are ascertained on a case by case basis. The parameters of the review that must be conducted outside the trial counsel files is dependent on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. *U.S. v. Williams*, 50 M.J. 46 (C.A.A.F. 1999) (holding that trial counsel had no duty to review unit disciplinary records for information concerning any investigations or prosecutions of government witnesses, where defense did not specifically request a review of such files. In *Williams*, the defense filed a general request for "any and all investigations or possible prosecutions pending which could be brought against any witness the government intends to call during the trial." *Williams* held this was not a specific request and the trial counsel was not required to review the unit files in which the information was located.) *Williams* went on to state that while the Government has a duty to review prosecution and police files readily available to the prosecution, it is not required to search for "a needle in a haystack".
4. The Government does not have a discovery obligation under RCM 701(a)(2) unless the discovery at issue is within the possession, custody, or control of military authorities, and is material to the preparation of the defense or intended for use by the trial counsel as evidence in

the Prosecution case in chief at trial, or was obtained from or belonged to the accused. To the extent relevant files are known to be under the control of another government entity, the Prosecution must make that fact known to the Defense and engage in good faith efforts to obtain the material. *Williams*, quoting *Simmons*, citing to the Standard 1102.1(a) Commentary, American Bar Association, Criminal Justice Discovery Standards 14 n. 9 (3d ed. 1995).

5. Evidence maintained by other government agencies, whether aligned with the Prosecution or not, are not within the control of military authorities IAW RCM 701(a)(2). (See *analysis* to RCM 701(a)(2) "Except for subsection (e), the rule deals with discovery in terms of disclosure of matters known to or in the possession of a party. Thus, the defense is entitled to disclosure of matters known to the trial counsel or in the possession of military authorities. Except as provided in subsection (e), the defense is not entitled under this rule to disclosure of matters not possessed by military authorities or to have the trial counsel seek out and produce such matters for it. ... Subsection (e) may accord the defense the right to have the Government assist the defense to secure evidence or information when not to do so would deny the defense similar access to what the prosecution would have if it were seeking the evidence or the information. See *U.S. v. Killebrew*, 9 MJ 154 (CMA 1980); *Halfacre v. Chambers*, 5 MJ 1099 (CMA 1976)."

6. The burden is on the Defense for production of evidence outside the control of military authorities for discovery under the relevant and necessary standard in RCM 703(f). Evidence that is material to the preparation of the defense under the control of other government agencies can be relevant and necessary for discovery, requiring production of the evidence from the other government entities pursuant to RCM 703(f)(1) and (4)(A).

7. For files pertaining to PFC Manning within the possession, custody, or control of military authorities that the Government is aware of and has searched for *Brady* material, Trial Counsel must turn over to the Defense any information that is obviously material to the preparation of the defense. This does not mean that the Government must search for information material to the preparation of the defense without a specific discovery request. Where a request is necessary, it is required to trigger the trial counsel's duty to disclose as a means of specifying what must be produced. Without such a request a trial counsel might be uncertain as to the extent of the duty to obtain matters not in his/her immediate possession. Any request should state with reasonable specificity what materials are sought. See *analysis* to RCM 701(a).

Conclusions of Law:

1. **Files under the possession, custody, or control of military authorities.** The Government will seek out and identify such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures. By **20 July 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control. Also by **25 July 2012**, if the relevant agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A). For all such files where a privilege under MRE 505(c) is not

claimed, by **3 August 2012** the Government will disclose such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures to the Defense or, submit them to the Court for *in camera* review under RCM 701(g) or for limited disclosure under MRE 505(g)(2).

2. Aligned Agencies:

DOJ – Defense moves to compel documents from DOJ related to the accused, WikiLeaks, and/or alleged leaks because the Government collaborated with federal prosecutors within DOJ during the investigation of the accused. Such files are not discoverable under RCM 701(f). As such, the defense has not shown relevance and necessity for production of DOJ files under RCM 703(f).

FBI/DSS – the FBI and DSS are aligned agencies that conducted an investigation of PFC Manning in conjunction with CID. The Government advised the Court it had disclosed the entire DSS investigation to the Defense. The Court finds the Defense has shown that the FBI file (minus grand jury testimony) to the extent relevant to an investigation of PFC Manning, is material to the preparation of the Defense to the extent that it is relevant and necessary for production under RCM 703(f). The Court will review the FBI Impact Statement *in camera* to determine whether it is material to the preparation of the defense to the extent relevant and necessary to require production for disclosure. The Government will **immediately** begin the process of producing the FBI investigative file and impact statement IAW RCM 703(f)(4)(A). By **25 July 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control. Also by **25 July 2012**, if the relevant Government agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A). For all such files where a privilege under MRE 505(c) is not claimed, by **3 August 2012** the Government will disclose such files regarding PFC Manning that involve investigation, damage assessment, or mitigation measures to the Defense or, submit them to the Court for *in camera* review under RCM 701(g) or for limited disclosure under MRE 505(g)(2).

ODNI/ONCIX – NLT **3 August 2012**, The Government will provide the Court with the damage assessment for *in camera* review. The Government has stated in its briefs that ONCIX is not an aligned agency but has not asked the Court to reconsider the portion of the 23 March 2012 ruling stating that it was.

CIA – The Court has conducted an *in camera* review of the WikiLeaks Task Force Damage Assessment and the proposed Government substitute under IAW MRE 505(g)(2). The Court's ruling with respect to this damage assessment is issued as a separate Appellate Exhibit.

3. Other.

DOS – The Court granted the Government's request for 30 days to respond to the Defense Motion to Compel DOS documents. On 9 July 2012 the Government will identify which files exist and provide its position to the Court IAW the Court's order of 8 June 2012.


17 April 2012 HQDA file – The Government alleges there is no "file". What, if any, file exists will be addressed at the Article 39(a) session on 25 June 2012.

Government Evidence in Merits/Sentencing – NLT 3 August 2012, the Government shall disclose evidence it will introduce on the merits and during sentencing.

Interagency Committee Review, President's Intelligence Advisory Board, and House of Representative Oversight Committee. The Defense moves to compel the Government to conduct *Brady* searches of the files of these entities. These are non-aligned entities who have had no interaction of or involvement with the Prosecution or the Criminal Investigation in this case. Their files are not readily available to the Prosecution. The Prosecution has had no access to these entities or their files. Although the Defense has made a specific request that the Court compel the Government to conduct a *Brady* search of these files, the Court finds that the files of these entities are too attenuated and beyond the outer parameters of the core files the Prosecution must search for *Brady*. The Government advised the Court that it had an ethical obligation to search the President's Intelligence Advisory Board for *Brady* material because it had reason to believe the files contained *Brady* material. As such, the Government will conduct a *Brady* search of the President's Intelligence Advisory Board files. The Court does not compel the Prosecution to search the files of the Interagency Committee Review or the House of Representative Oversight Committee.

RULING: The Defense Motion to Compel Discovery #2 is **Granted** in part as set forth above.

So **ORDERED:** this 22nd day of June 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

The Government substitute is a redacted version of the original that discloses *Brady* and RCM 701(a)(6) material.

The Government has advised the Court that nothing in the FBI Impact Statement that has not been disclosed to the Defense will be used by the Government or by any Government witness during any portion of the trial. As such, the remainder of the FBI Impact Statement is not material to the preparation of the defense or relevant and necessary for production under RCM 703(f).

The FBI Impact Statement substitution meets the Government's discovery obligations under *Brady* and RCM 701(a)(6) to disclose evidence tending to reasonably negate the guilt of the accused to an offense charged, reduce the degree of guilt to an offense charged, or reduce the punishment.

The Government is ordered that no portion of the FBI Impact Statement not disclosed to the Defense will be used by the Government or any Government witness during any portion of the trial. This includes rebuttal, rule of completeness, and sentencing if Defense introduces or references anything in the substitution.

The substitution is sufficient for the Defense to adequately prepare for trial and represents an appropriate balance between the right of the Defense to discovery and the protection of specific national security information.

RULING: The Classified motion by the Government to voluntarily provide limited disclosure under MRE 505(g)(2) for the FBI Impact Statement is **GRANTED**.

Ordered this 19th day of July 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

COURT MEMBER
SUPPLEMENTAL QUESTIONNAIRE
(PLEASE PRINT CLEARLY)

This questionnaire is submitted to detailed court members under Rule for Courts-Martial 912(a)(1), Manual for Courts-Martial. Its purpose is to provide counsel with general information relevant to a member's participation in a particular case. This information will be made available to trial and defense counsel before trial so that they may have general information about a member's background before assembly of the court and is also available to the military judge. Disclosure of this information is voluntary. Nondisclosure may require a member to provide such matters at trial. By requesting this information on a one-time basis before you actually serve as a member, repetitive questions and unnecessary delay can be avoided. Your responses should be forwarded to the Office of the Staff Judge Advocate, ATTN: Chief, Criminal Law Division.

1. Name: _____

2. Rank: _____ 3. Date of rank: _____

4. Sex: _____ 5. Race: _____

6. Current Unit Assignment: _____

7. Present Duty Position and Description: _____

8. Length of Present Assignment: _____

9. Name and Title of Supervisor: _____

10. Do you now have, or have you ever had the authority to train, supervise, assign, evaluate, or discipline others? ☐ YES ☐ NO If YES, please describe your feelings concerning the importance of mentoring junior enlisted: _____

11. Why do junior enlisted need to be mentored? _____

12. Have you ever had a SIPRNET account or worked on a classified computer? ☐ YES ☐ NO

13. Have you ever handled classified information in any form? ☐ YES ☐ NO

14. Have you ever printed classified information or saved classified information to a CD or other removable media? ☐ YES ☐ NO

15. Have you ever worked in a Sensitive Compartmented Information Facility (SCIF)? ☐ YES ☐ NO

16. Have you ever worked in a facility that authorized open storage of classified information? ☐ YES ☐ NO

17. Have you ever removed classified information from a government facility? ☐ YES ☐ NO

18. Have you ever been an authorized courier of classified information? ☐ YES ☐ NO

19. Have you ever seen another Soldier been denied a security clearance or had a security clearance revoked? ☐ YES ☐ NO If YES, please indicate when and the reason for the denial or revocation: _____

20. Have you ever seen another Soldier's security clearance be revoked due to signs of mental or emotional instability? ☐ YES ☐ NO If YES, please describe: _____

21. Have you deployed and come in contact with the enemy? ☐ YES ☐ NO If YES, please give dates and locations: _____

22. (Officers only) Have you had any enlisted service? ☐ YES ☐ NO If YES, please indicate:

DATES	YEARS	HIGHEST RANK

23. Have you ever been employed as a civilian? ☐ YES ☐ NO If YES, please indicate the following for each employment for the past 10 years:

DATES	LENGTH OF EMPLOYMENT	NAME & NATURE OF BUSINESS	TITLE & DUTIES

24. Is English your first language? ☐ YES ☐ NO If NO, what was your first language and when did you begin speaking English? _____

25. What is the primary language spoken in your home? _____

26. Do you have any difficulty in reading or writing the English language? ☐ YES ☐ NO If YES, please explain: _____

27. Do any dependants live in your household? ☐ YES ☐ NO If yes, please list their relationship to you, as well as their sex and age: _____

28. Please indicate your current marital status:

- ☐ SINGLE (NEVER BEEN MARRIED) _____
☐ DIVORCED (HOW LONG?) _____
☐ WIDOWED (HOW LONG?) _____

- ☐ SEPARATED (HOW LONG?) _____
☐ DIVORCED/REMARIED (HOW LONG?) _____
☐ WIDOWED/REMARIED (HOW LONG?) _____

29. Current and/or former spouse's employer, job title, description and duties: _____

30. Summary of current and/or former spouse's employment for past ten years (if any):

DATES	LENGTH OF EMPLOYMENT	NAME & NATURE OF BUSINESS	TITLE & DUTIES

31. What special recognition, awards, medals or commendations did your current and/or former spouse receive? _____

32. Has your current and/or former spouse deployed and come in contact with the enemy? ☐ YES ☐ NO
If YES, please give dates and locations: _____

33. Is your current and/or former spouse a high school graduate? ☐ YES ☐ NO

34. Has your current and/or former spouse attended any technical or trade schools or college, as an undergraduate or graduate student? ☐ YES ☐ NO If YES, please indicate the following for each school attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

35. Has your current and/or former spouse attended any military training/education? ☐ YES ☐ NO If YES, please indicate the following for each:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	LENGTH	TOPIC	DEGREE EARNED

36. How many individuals live in the household in which you were raised? ____ What was their relationship to you (e.g., father, stepbrother, etc.)? _____

37. Have any of those listed above ever deployed and come in contact with the enemy? ☐ YES ☐ NO
If YES, please give dates and locations for each: _____

38. Please list the civil clubs, societies, professional associations, or other organizations to which you now belong, or to which you have belonged in the past: _____

39. Have you ever served as an officer or held a position of leadership in any of these organizations?
☐ YES ☐ NO If YES, please explain: _____

40. What are your hobbies: _____

41. What do you enjoy doing in your spare time: _____

42. What were the last three books you have read: (1) _____
(2) _____ (3) _____

43. In general, what types of books do you most often read? _____

44. Have you ever read a book about releasing classified information or any similar action? ☐ YES ☐ NO
If YES, which book, who was the author, what trial or crime and why were you interested? _____

45. What newspapers do you regularly read or subscribe to: _____

46. What magazines, journals or other periodicals do you regularly read or subscribe to: _____

47. Have you ever written a letter to the editor? ☐ YES ☐ NO If YES, about what issue did you write and why did you decide to write the letter: _____

48. Do you usually read for ☐ ENTERTAINMENT PURPOSES ☐ BUSINESS PURPOSES ☐ OTHER PURPOSES?

49. How often do you listen to the radio, which stations and which programs do you usually listen to? _____

50. What television shows do you watch regularly: (1) _____
(2) _____ (3) _____

51. What is your main source of news? _____

52. Which television news programs do you usually watch for local, state, national and world news? _____

53. Are you most interested in Local, State, National or World news? _____

54. Do you typically watch any news magazine programs (*Dateline NBC, 20/20, 60 Minutes, 48 Hours*, etc.)? ☐ YES ☐ NO If YES, which programs? _____

55. How often do you go to see a movie? _____

56. In general, what types of movies do you most prefer (i.e. romantic comedies, dramas, action, mysteries, science fiction, etc.)? _____

57. What are the last three movies you went to see: (1) _____
(2) _____ (3) _____

58. On *social* issues, are you:

☐ VERY CONSERVATIVE ☐ CONSERVATIVE ☐ MODERATE ☐ LIBERAL ☐ VERY LIBERAL

Please explain: _____

59. Have you ever signed a petition? ☐ YES ☐ NO If YES, please tell us what were the issue(s): _____

60. Have you ever participated in a march, protest or demonstration? ☐ YES ☐ NO If YES, please tell us when and what were the issue(s): _____

61. What are your thoughts, feelings or opinions, in general, about psychiatrists, psychologists, social workers, counselors or other mental health professionals? _____

62. Do you do any volunteer work? ☐ YES ☐ NO If YES, with which organizations do you volunteer? _____

63. Do you know anyone who has experienced any type of abusive relationship (sexual abuse, physical abuse, verbal abuse, emotional/psychological abuse, etc.)? ☐ YES ☐ NO If YES, please explain: _____

64. Have you, any family member or close friend ever been accused, arrested or convicted of a criminal offense? ☐ YES ☐ NO If YES, please explain: _____

65. Do you know anyone who has been in jail or who has been to prison? ☐ YES ☐ NO If YES, please explain: _____

66. What is your personal opinion about the military justice system? _____

67. Do you believe the military justice system is fair? ☐ YES ☐ NO Please explain your answer: _____

68. Do you believe the military justice system should be influenced by outside civilian pressures to send a message in certain cases? ☐ YES ☐ NO Please explain your answer: _____

69. Have you ever watched any criminal trial (civilian or military) in person? ☐ YES ☐ NO If YES, please explain circumstances: _____

70. What is the first thing that comes to your mind when you think of a:
Criminal Defense Attorney: _____

Prosecuting Attorney: _____

71. What criminal cases have you followed in the media and why did you follow those cases? _____

72. What is your opinion about the accuracy of media reports about crimes, in general? _____

73. The Accused in this case is PFC Bradley Manning. The website WikiLeaks is also involved in this case. Do you know, or believe you know, anything about this case, from any source, including the newspaper, radio, television or discussions with others? ☐ YES ☐ NO If YES, from which sources, what have you heard, read, seen or talked about concerning this case and what is your reaction to that information? _____

74. Based on what you have heard, read, seen or discussed concerning this case, what opinions have you formed concerning the people involved? _____

75. Based on what you have heard, read, seen or discussed concerning this case, have you formed any opinions on how the case is being handled and what the outcome should be? _____

76. Have you ever counseled a Soldier regarding his/her sexual preference? ☐ YES ☐ NO If YES, please explain what prompted your counseling of the Soldier: _____

77. Have you ever initiated UCMJ action against a Soldier based on homosexual conduct? ☐ YES ☐ NO If YES, please explain what prompted you to initiate UCMJ action: _____

78. Have you ever initiated administrative separation action against a Soldier based on his/her sexual preference? ☐ YES ☐ NO If YES, please explain what prompted you to initiate administrative separation action: _____

79. Have you ever recommended separation of a Soldier based on his/her sexual preference? ☐ YES ☐ NO If YES, approximately how many times? _____

80. Do you agree with the repeal of DADT? Why or why not? _____

81. Have you seen any negative impact from the repeal of DADT? If so, what? _____

82. Have you seen any positive impact from the repeal of DADT? If so, what? _____

83. Are any members of your immediate family homosexual? ☐ YES ☐ NO

84. Are any of your close friends homosexual? ☐ YES ☐ NO

85. Are you familiar with Gender Identity Disorder? ☐ YES ☐ NO If YES, please how you are familiar: _____

86. What do you think when you see a cross-dresser on the street? _____

87. Have you deployed to Iraq or Afghanistan? ☐ YES ☐ NO If NO, please skip to Question 90. If YES, please provide the date(s) and location(s) of your deployment: _____

88. How would you characterize your deployment experience? _____

89. Did you work with Department of State personnel during your deployment? ☐ YES ☐ NO If YES, what was your attitude towards Department of State personnel? _____

90. Please indicate your level of agreement or disagreement to the following statement: If the case is a high profile case, it is important to ensure the punishment is severe to send the appropriate message.

☐ STRONGLY AGREE ☐ MODERATELY AGREE ☐ SLIGHTLY AGREE
☐ STRONGLY DISAGREE ☐ MODERATELY DISAGREE ☐ SLIGHTLY DISAGREE

Please explain your answer: _____

91. As a result of your having been asked to fill out this questionnaire, have you formed any opinions about this case? ☐ YES ☐ NO If YES, please explain: _____

92. Is there anything that was not asked that you believe is important to know about you? ☐ YES ☐ NO If YES, please explain: _____

93. Is there anything that you would like to discuss privately with the court? ☐ YES ☐ NO If YES, please explain: _____

LT Gen Flynn (Quantico)

Col. Choike (Quantico Garrison)

Col. Olman (MCBA Security Bn CO)

CWO2 Denise Barnes (Brig CO)
(previously CWO4 Averhart)

Gun Sgt Blenis
(injured.)

[Print](#) | [Close Window](#)**Subject:** RE: Government Filing - Request for Court Order (UNCLASSIFIED)**From:** "David Coombs" <coombs@armycourt martialdefense.com>**Date:** Mon, Aug 20, 2012 7:40 pm

To: ""Lind, Denise R COL USARMY \US\"" <denise.r.lind.mil@mail.mil>
 ""Hurley, Thomas F MAJ OSD OMC Defense"" <thomas.hurley@osd.mil>,
 ""Tooman, Joshua J CPT USARMY \US\"" <joshua.j.tooman.mil@mail.mil>,
 ""Morrow, JoDean \Joel\ III CPT USARMY USAMDW \US\""
 <jodean.morrow.mil@mail.mil>, ""Whyte, J Hunter CPT USARMY \US\""
 <jeffrey.h.whyte.mil@mail.mil>, ""von Elten, Alexander S \Alec\ CPT USARMY
 \US\"" <alexander.s.vonelten.mil@mail.mil>, ""Ford, Arthur D Jr CW2 USARMY
 \US\"" <arthur.d.ford.mil@mail.mil>, ""Williams, Patricia A CIV \US\""
Cc: <patricia.a.williams74.civ@mail.mil>, ""Jefferson, Dashawn MSG USARMY \US\""
 <dashawn.jefferson.mil@mail.mil>, ""Moore, Katrina R SFC USARMY \US\""
 <katrina.r.moore2.mil@mail.mil>, ""Overgaard, Angel M CPT USARMY \US\""
 <angel.m.overgaard.mil@mail.mil>, ""Fein, Ashden MAJ USARMY \US\""
 <ashden.fein.mil@mail.mil>

Ma'am,

The Defense is not claiming a privilege. However, we would maintain that the testimony from Capt. Richardson, LTC Russell, and LCDR Weber is not relevant to PFC Manning's treatment while at Quantico. None of these individuals spoke to anyone from Quantico. To the extent the Quantico Brig relied upon conduct by PFC Manning in Kuwait to justify his custody status, it is based upon documentation that the Government has provided to the Defense in discovery. The Government is certainly free to introduce this documentation. Anything else, however, is outside of what Quantico would have considered in making its custody determination.

v/r
David

David E. Coombs, Esq.
 Law Office of David E. Coombs
 11 South Angell Street, #317
 Providence, RI 02906
 Toll Free: 1-800-588-4156
 Local: (508) 689-4616
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 coombs@armycourt martialdefense.com
 www.armycourt martialdefense.com

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-----Original Message-----

APPELLATE EXHIBIT 277
 PAGE REFERENCED:
 PAGE ___ OF ___ PAGES

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]
Sent: Monday, August 20, 2012 4:48 PM
To: Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USARMY MDW (US)
Cc: David Coombs; 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J
CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Whyte, J
Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US);
Ford, Arthur D Jr CW2 USARMY (US); Williams, Patricia A CIV (US);
Jefferson, Dashawn MSG USARMY (US); Moore, Katrina R SFC USARMY (US);
Overgaard, Angel M CPT USARMY (US)
Subject: RE: Government Filing - Request for Court Order (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Counsel,

The Court has not received any notification that the defense is claiming a
privilege under MRE 513.

Is the defense claiming a privilege under MRE 513 for the information the
government requests in its motion for a court order? If yes, at the 28-30
August 2012 article 39(a) session, be prepared to address whether an
exception to MRE 513 applies under MRE 513(3)(4)(6) and/or (7) apply and
whether the privilege is waived under RME 510.

D

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

—Original Message—

From: Lind, Denise R COL USARMY (US)
Sent: Monday, August 20, 2012 4:15 PM
To: Fein, Ashden MAJ USARMY MDW (US)
Cc: David Coombs; 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J
CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Whyte, J
Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US);
Ford, Arthur D Jr CW2 USARMY (US); Williams, Patricia A CIV (US);
Jefferson, Dashawn MSG USARMY (US); Moore, Katrina R SFC USARMY (US);
Overgaard, Angel M CPT USARMY (US)
Subject: RE: Government Filing - Request for Court Order (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Counsel,

I have it under advisement.

D

DENISE R. LIND

COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Fein, Ashden MAJ USARMY MDW (US)
Sent: Monday, August 20, 2012 4:01 PM
To: Lind, Denise R COL USARMY (US)
Cc: David Coombs; 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); Williams, Patricia A CIV (US); Jefferson, Dashawn MSG USARMY (US); Moore, Katrina R SFC USARMY (US); Overgaard, Angel M CPT USARMY (US)
Subject: Government Filing - Request for Court Order (UNCLASSIFIED)

Ma'am,

On Thursday, 16 August, the United States, through CPT Overgaard, submitted the attached motion to the Court, but did not receive acknowledgment from the Court or defense. Could you and the defense please confirm receipt? Thank you.

v/r
MAJ Fein

-----Original Message-----

From: Overgaard, Angel M CPT USARMY (US)
Sent: Thursday, August 16, 2012 8:15 PM
To: Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USARMY MDW (US)
Cc: David Coombs; 'Hurley, Thomas F MAJ OSD OMC Defense'; Tooman, Joshua J CPT USARMY (US); Morrow, JoDean (Joe) III CPT USARMY USAMDW (US); Whyte, J Hunter CPT USARMY (US); von Elten, Alexander S (Alec) CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); Williams, Patricia A CIV (US); Jefferson, Dashawn MSG USARMY (US); Moore, Katrina R SFC USARMY (US)
Subject: Government Filing - Request for Court Order (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Ma'am:

Attached is a government motion requesting the Court order the Accused's mental health professionals to speak with and disclose their notes to the prosecution. A draft order is also attached.

Certain mental health professionals of the Accused, in particular, two on the prosecution's Article 13 witness list, will not speak with the prosecution without either a waiver or a court order. On Tuesday, the prosecution asked the defense to provide a waiver. On Wednesday, the defense informed the prosecution that we would need to request a Court Order.

Thank you.

VR
ANGEL M. OVERGAARD
CPT, JA
Trial Counsel, MDW

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

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Appellate Exhibit 278

9 pages

classified

"SECRET"

ordered sealed for Reason 2

Military Judge's Seal Order

dated 20 August 2013

stored in the classified

supplement to the original

Record of Trial

Appellate Exhibit 278,

Enclosure 1

has been entered into

the record as

Appellate Exhibit 178,

Enclosure 1

Appellate Exhibit 278,
Enclosure 2

has been entered into
the record as
Appellate Exhibit 178,
Enclosure 2

Appellate Exhibit 278

Enclosure 3

15 pages

classified

"SECRET"

ordered sealed for Reason 2

Military Judge's Seal Order

dated 20 August 2013

stored in the classified

supplement to the original

Record of Trial

Appellate Exhibit 278,
Enclosure 4

has been entered into
the record as

Appellate Exhibit 178,
Enclosure 4

))))))))))

**Prosecution Motion
For Preliminary Determination of
Admissibility of Evidence
(Computer-Generated Records)**

Enclosures 5-6

See Attached CD

Appellate Exhibit 278
Enclosures 5-6
(Attachment)

have been entered into
the record as a CD/DVD
and will be maintained
with the original
Record of Trial

)))))))))

**Prosecution Motion
For Preliminary Determination of
Admissibility of Evidence
(Computer-Generated Records)**

Enclosures 5-6

3 August 2012

Appellate Exhibit 278
Enclosures 5-6
(Attachment)

have been entered into
the record as a CD/DVD
and will be maintained
with the original
Record of Trial

Appellate Exhibit 278,
Enclosure 7
has been entered into
the record as
Prosecution Exhibit 141

Appellate Exhibit 278,
Enclosure 8
has been entered into
the record as
Prosecution Exhibit 61

Appellate Exhibit 278

Enclosure 9

2 pages and 1 CD

classified

"SECRET"

ordered sealed for Reason 2

Military Judge's Seal Order

dated 20 August 2013

stored in the classified

supplement to the original

Record of Trial

Appellate Exhibit 279
has been entered into
the record as a CD/DVD
and will be maintained
with the original
Record of Trial

Appellate Exhibit 280
has been entered into
the record as a CD/DVD
and will be maintained
with the original
Record of Trial

Appellate Exhibit 281
1 CD
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**RULING: Prosecution Motion
To Admit Evidence**

29 August 2012

1. The Government moves to pre-admit the following evidence enclosed to Appellate Exhibit 278:

Enclosure 5: OSC User Information Files (bmanning) with attestation;

Enclosure 6: OSC User Information Files (bradass87) with attestation;

Enclosure 7: OSC Logs (bmanning & bradass87) with attestation;

Enclosure 8: Intelink .22 & .40 Logs with attestation;

Enclosure 9: Intelink Passport Account Information with attestation.

2. Government proffers that the above evidence is admissible as machine generated data and as properly authenticated business records.

3. Defense objects on the ground that the keystroke searches by the custodian of the record are testimonial statements and the resulting data are records of searches and are also testimonial statements.

Findings of Fact:

1. The data in Enclosures 5, 6, and 7 were maintained by the CIA in electronically searchable databases for business purposes. The data in Enclosures 8 and 9 were maintained by the NSA in electronically searchable databases for business purposes.

2. The data was collected prior to or contemporaneous with the dates of the charged offenses and was maintained by the entity for business purposes before the query for information by law enforcement.

The Law:

1. The Sixth Amendment precludes testimonial hearsay from coming into evidence against an accused without cross-examination of the declarant unless (1) the declarant is unavailable and (2)


the declarant was subject to prior cross examination. *U.S. v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

2. A statement is testimonial if made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial. A document created solely for an evidentiary purpose made in aid of a police investigation is testimonial. While formalized certifications of results in lab reports are testimonial, machine generated data and printouts are not statements and, thus, they are not hearsay. *Sweeney*, 70 M.J. at 301; *U.S. v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007) (affidavit filled out by victim of check fraud pursuant to internal bank procedures admissible as non-testimonial business record even if later turned over to law enforcement.).

Conclusions of Law:

1. The fact that information maintained on a business related database is pulled from that database as a result of a typed in search query by the records custodian at the request of a law enforcement query does not transform machine generated data into a testimonial statement. It is the nature of the underlying data at issue not the form of the query, the fields of the query, or who made the query that determines whether the information is machine generated, a statement, or a testimonial statement.
2. Unlike the cover memorandum and results certification that were held to be testimonial statements in *Sweeney*, the machine generated data offered for admission by the Government in this case contains no additional representations or certifications that were not machine generated.
3. The records offered for admission by the Government are machine generated and not statements. They are properly authenticated. If the Government offers evidence to show their relevance, the exhibits are admissible.

So **Ordered** this 29th day of August 2012.


DENISE R. LIND
COL., JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

RULING: Defense Motion:
Close Court to Litigate
Admissibility of MRE 404(b)
Evidence

29 August 2012

The Government moves to make a preliminary determination on the admissibility of evidence of three crimes, wrongs, or acts, under MRE 404(b) and on the use of such evidence to rebut the offer of a pertinent character trait under MRE 404(a). The evidence the Government seeks to admit is:

1. **MRE 404(B) act 1:** On 28 June 2008, SFC Brian Madrid observed postings by the accused on YouTube using "buzzwords" such as top secret, secret, classified and SCIF, against his training. As corrective training, SFC Madrid required the accused to give a presentation to the platoon at formation, present a PowerPoint presentation to SFC Madrid and prepare a written product. The accused's presentation to the platoon discussed information security, proper handling of information, a Soldier's obligation to protect and not expose classified material, the possibility that a Soldier's disclosure that he or she has access to classified material may be dangerous to the Soldier, and that enemy forces are trying to collect information on the U.S. Military. The accused's written product and PowerPoint presentation defined secret information and identified the type of people who try to collect information for use against the United States, such as foreign governments, enemies, spies, hackers, etc.
2. **MRE 404(b) act 2:**
3. **MRE 404(b) act 3:**

The Defense moves to close the court during the Article 39(a) sessions of the court during which evidence is adduced, argument is made, and the court's ruling announced with respect to on the Government's MRE 404(b) motion regarding MRE 404(b) acts 2 and 3 above because this case has received and continues to receive media attention and public airing the facts giving rise to this motion will impact PFC Manning's ability to receive a fair trial and there is no alternative to closure that will protect against that harm.

The Law:

1. The First Amendment protects the public's right to an open trial. The Sixth Amendment protects the accused's right to a public trial. Both Constitutional Amendments and RCM 806 provide that courts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no

broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered but found to be inadequate; and (4) the military judge makes case-specific findings on the record justifying closure *U.S. v. Hershey*, 20 M.J. 433 (C.M.A. 1985); *ABC Inc. v. Powell*, 47 M.J. 363, 365 (C.M.A. 1997).


2. The trial court must consider alternatives to closure even if not offered by the parties. Trial courts must take every reasonable measure to accommodate public attendance at criminal trials. *Presley v. Georgia*, 558 U.S. 209 (2010).

Conclusions of Law:

1. The Court takes judicial notice that there has been consistent and extensive media coverage of this case.
2. The Defense has demonstrated that preventing the fact-finder from pretrial bias from pretrial publicity of the underlying facts of uncharged conduct by the accused as offered by the Government as MRE 404(b) acts 2 and 3 is an overriding interest likely to be prejudiced if the proceedings remain open.
3. Closure of the Article 39(a) session during which the Government's MRE 404(b) motion is litigated for MRE 404(b) acts 2 and 3 is more broad than necessary to protect that interest. There are reasonable alternatives to closing the proceedings.
4. Identification of the underlying facts of MRE 404(b) acts 2 and 3 are not necessary during oral argument for the parties to litigate the Government's MRE 404(b) motion regarding the reasons why the evidence should or should not be admitted or why the evidence is or is not admissible under MRE 403.

RULING: The Court shall remain open during the litigation of the Government's MRE 404(b) motion. The parties shall identify the acts at issue as MRE 404(b) act 2 and MRE 404(b) act 3 without going into the underlying specifics.

So **Ordered** this 29th day of August 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES

V

MANNING, Bradley E., PFC
U.S. Army, [REDACTED]
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211

**RULING: GOVERNMENT
MOTION FOR MRE 505(g)(2)
REDACTIONS - CIA WL
TASK FORCE REPORT ON
DISCRETE MATTER**

DATED: 30 August 2012

The concerns raised by the Court in the *ex parte in camera* Article 39(a) session have been addressed by the Government. In coming to this ruling, the Court has considered the factors requested by the Defense in its 21 August 2012 submission.

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government's very broad reading of many of these offenses?
- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? If so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?

APPELLATE EXHIBIT 28
PAGE REFERENCED: _____
PAGE OF PAGES

- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?


The CIA Report Substitution, as redacted, meets the Government's discovery obligations under *Brady* and RCM 701(a)(6) to disclose evidence tending to reasonably negate the guilt of the accused to an offense charged, reduce the degree of guilt to an offense charged, or reduce the punishment. The redacted information not disclosed to the Defense is not favorable, material to the preparation of the defense, or relevant and necessary for production under RCM 703(f).

The Government is ordered that no portion of the CIA Report not disclosed to the Defense will be used by the Government or any Government witness during any portion of the trial. This includes rebuttal and rule of completeness if Defense introduces or references anything in the substitution.

The substitution is sufficient for the Defense to adequately prepare for trial and represents an appropriate balance between the right of the Defense to discovery and the protection of specifically identified national security information that risks release of intelligence sources and methods.

RULING: The Classified motion by the Government to voluntarily provide limited disclosure under MRE 505(g)(2) for the CIA Report on a Discrete Matter is **GRANTED**.

So **ORDERED** this 30th day of August 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES

V

U.S. Army,

**Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211**

**RULING: GOVERNMENT
MOTION FOR MRE 505(g)(2)
REDACTIONS - DIA
RECORDS**

DATED: 30 August 2012

The concerns raised by the Court in the *ex parte in camera* Article 39(a) session have been addressed by the Government. In coming to this ruling, the Court has considered the factors requested by the Defense in its 21 August 2012 submission.

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government's very broad reading of many of these offenses?
- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? If so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?

- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

The DIA Records, as redacted, meets the Government's discovery obligations under *Brady* and RCM 701(a)(6) to disclose evidence tending to reasonably negate the guilt of the accused to an offense charged, reduce the degree of guilt to an offense charged, or reduce the punishment. The redacted information not disclosed to the Defense is not favorable or material to the preparation of the defense under MRE 701(a)(2).

The Government is ordered that no portion of the DIA Records not disclosed to the Defense will be used by the Government or any Government witness during any portion of the trial. This includes rebuttal and rule of completeness if Defense introduces or references anything in the substitution.

A substantial portion of the DIA Records is disclosed to the Defense. The redacted information is information that is not relevant to the case. An example would be a long email with a small paragraph referencing this case. The part of the email addressing irrelevant subject matter is redacted. Other redactions are to protect the release of sensitive national security information, to include intelligence sources and methods. The substitution is sufficient for the Defense to adequately prepare for trial. It represents an appropriate balance between the right of the Defense to discovery and the protection of specifically identified national security information that risks release of intelligence sources and methods.

RULING: The Classified motions by the Government to voluntarily provide limited disclosure under MRE 505(g)(2) for the DIA Records is **GRANTED**.

So **ORDERED** this 30th day of August 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Scheduling Order

30 August 2012

1. The Court is currently scheduling Article 39(a) sessions with the following default schedule at the request of the parties: two weeks for parties to file motions; two weeks for parties to file responses; five days for parties to file replies; and one week for the Court to review all pleadings before the start of the motions hearing. The time for filing replies was added after the first Article 39(a) session on 15-16 March 2012 because the Court received reply briefs the day before that session, the parties desire to continue to file replies, and the Court requires time to consider them.

2. Scheduling dates and suspense dates are set forth below. This schedule was coordinated with the parties. The trial schedule will be reviewed and updated as necessary at each scheduled Article 39(a) session.

- a. Immediate Action (21 February 2012 - 16 March 2012)
- b. Legal Motions, excluding Evidentiary Issues (29 March 2012 - 26 April 2012)
- c. Legal Motions (10 May 2012 - 8 June 2012)
- d. Interim Pretrial Motions (2 June 2012 - 25 June 2012)
- e. Pretrial Motions (7 June 2012 - 20 July 2012)
- f. Pretrial Motions (20 July 2012 - 30 August 2012)
- g. Pretrial Motions (24 August 2012 - 18 October 2012)

(A) Article 39(a): 17-18 October 2012

(1) Government Discovery for Information Owned by the CIA, DHS and ODNI¹

¹ On 25 July 2012, the prosecution requested leave until 14 September 2012 to disclose a subset group of information owned by the Central Intelligence Agency (CIA), the Department of Homeland Security (DHS), and the Office of the Director of National Intelligence (ODNI). On 26 July 2012, the defense filed an objection. On 26 July 2012, the Court ordered the prosecution to file a supplemental pleading, stating with particularity the review and approval procedures required prior to disclosure of information above the "secret" level and how that differs from the review and approval procedures required prior to disclosure of information at or below the "secret" level. On 1 August 2012, the Court granted the Government's request for leave until 14 September 2012 in part. The Court Ordered the Government, upon receipt of agency approval, to immediately disclose discoverable classified information to the Defense or to the Court IAW RCM 701(g)(2) or MRE 505(g)(2).

(A) Filing: 14 September 2012

(2) Government Discovery Disclosure to Court under RCM 701(g)(2) or MRE 505(g)(2) of All Information Subject to the Court's 22 June 2012 Ruling²

(A) Filing: 14 September 2012

(3) Defense Witness List for Speedy Trial, including Article 10

(A) Witness Lists: 24 August 2012

(4) Government Chronology for Speedy Trial, including Article 10

(A) Witness Lists: 26 September 2012

(5) Defense Updated Witness List for Speedy Trial, including Article 10

(A) Filing: 2 October 2012

(B) Response: 9 October 2012

(C) Reply: 11 October 2012

(6) Defense Supplemental Article 13 Motion

(A) Filing: 24 August 2012

(B) Response: 7 September 2012

(C) Reply: 14 September 2012

(7) Government Supplemental Article 13 Motion Witness List (if necessary)

(A) Filing: 4 September 2012

(8) Court Member Questionnaires

(A) To Detailed Members and Alternates: 4 September 2012

(B) Suspense for Detailed Members and Alternates to Respond: 21 September 2012

(9) Disclosure to Defense, Disclosure to the Court under MRE 505(g)(2), Notification to the Court of Claim of Privilege under MRE 505(c), or Filing for *In Camera* Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) for DOS Information Subject to the Court's 19 July 2012 Order

(A) Date: 14 September 2012

h. Pretrial Motions (26 September 2012 - 2 November 2012)

(A) Article 39(a): 29 October 2012-2 November 2012

(1) Defense Additional Witness List #2 for Article 13 Motion

(A) Witness List: 26 September 2012

(B) Government Objections (if any): 16 October 2012

(C) Defense Motion to Compel (if any): 22 October 2012

² On 21 August 2012, the Court Ordered the Government to specifically justify each proposed redaction for the FBI file by 14 September 2012.

- (2) **Defense Motion for Speedy Trial, including Article 10**
 - (A) Filing: 19 September 2012
 - (B) Response: 10 October 2012
 - (C) Reply: 17 October 2012

- (3) **Government Witness List for Response to Defense Motion for Speedy Trial, including Article 10**
 - (A) Filing: 9 October 2012

- (4) **Defense Notice of Intent to Disclose Classified Information under MRE 505(h) (From Subsequent Disclosures)**
 - (A) Filing: 15 October 2012
 - (B) Response: 26 October 2012

- (5) **Witness List (Defense and Supplemental Government)**
 - (A) Filing: 15 October 2012

- (6) **Defense Production of Government Reciprocal Discovery Request**
 - (A) Date: 15 October 2012

- (7) **Defense Notice of Accused's Forum Selection and Notice of Pleas in Writing**
 - (A) Filing: 15 October 2012

- (8) **Defense Notice of its Intent to Offer the Defense of Lack of Mental Responsibility IAW RCM 701(b)(2)**
 - (A) Filing: 15 October 2012

- (9) **Disclosure of RCM 914 Material**
 - (A) Date: 15 October 2012

- i. **Pretrial Motions (19 October 2012 - 2 December 2012)**
 - (A) Filing: 19 October 2012
 - (B) Response: 2 November 2012
 - (C) Reply: 9 November 2012
 - (D) Article 39(a): 27 November 2012-2 December 2012

- (1) **Defense Supplemental #2 for Article 13 Motion**

- (2) **Defense Article 13 Motion (Article 39(a) only)**

- j. **Pretrial Motions (16 November 2012 - 14 December 2012)**
 - (A) Filing: 16 November 2012
 - (B) Response: 30 November 2012
 - (C) Reply: 5 December 2012

(D) Article 39(a): 10-14 December 2012

(1) **Defense Witness List Litigation**

(A) Government Objection to Defense Witnesses: 16 November 2012

(B) Motion to Compel Production: 30 November 2012

(C) Response: 5 December 2012

(2) **Government Motion to Compel Discovery (if any)**

(3) **Defense Motion to Compel Discovery #4 (if necessary)**

(4) **Additional Requests for Judicial Notice**

(5) **Pre-Qualification of Experts**

(6) **Motions *in Limine* (Supplemental, Including any Classified Information) (if necessary)**

k. Pretrial Motions (7 December 2012 - 18 January 2013)

(A) Filing: 21 December 2012

(B) Response: 4 January 2013

(C) Reply: 9 January 2013

(D) Article 39(a): 14-18 January 2013

(1) **Litigation Concerning MRE 505(h) and MRE 505(i) (If not previously resolved)**

(A) Filing: 7 December 2012

(B) Response: 21 December 2012

(2) **Supplemental Government Witness List (if necessary)**

(A) Date: 14 December 2012

(3) **Production of Compelled Discovery from Defense**

(A) Date: 14 December 2012

(4) **Grunden Hearing for Government Classified Information**

(5) **Voir Dire Questions, Flyer, Findings/Sentence Worksheet, All CMCOs**

(A) Filing for Court Review: 4 January 2013

l. Pretrial Motions (28-29 January 2013)


(1) **Grunden Hearing for Defense Classified Information**

(2) **Completion of Security Clearance Checks for Witnesses (as necessary)**

m. Trial by Members (30 January 2013 - 22 February 2013)

- (1) Voir Dire: 30 January 2013-31 January 2013
- (2) Trial: 4 February 2013-15 March 2013

So **Ordered** this 30th day of August 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

RULING: Government Motion:
MRE 404(b) Evidence
Admissibility

30 August 2012

The Government moves to make a preliminary determination on the admissibility of three instances of crimes, wrongs, or acts, under MRE 404(b) and on the use of such evidence to rebut the offer of a pertinent character trait under MRE 404(a). Defense opposes.

Findings of Fact:

MRE 404(b) act 1: June 2008 internet posting by the accused and corrective training.

1. The Government proffers that on 28 June 2012, SFC (Ret) Brian Madrid, the accused's AIT platoon sergeant, observed postings by the accused on YouTube using "buzzwords" such as top secret, secret, classified and SCIF, against his training. As corrective training, SFC Madrid required the accused to give a presentation to the platoon at formation, present a PowerPoint presentation to SFC (Ret) Madrid and prepare a written product. The accused's presentation to the platoon discussed information security, proper handling of information, a Soldier's obligation to protect and not expose classified material, the possibility that a Soldier's disclosure that he or she has access to classified material may be dangerous to the Soldier, and that enemy forces are trying to collect information on the U.S. Military. The accused's written product and PowerPoint presentation defined secret information and identified the type of people who try to collect information for use against the United States, such as foreign governments, enemies, spies, hackers, etc.
2. The Government will offer this evidence through the testimony of SFC(Ret) Madrid and a slide show found on the accused's external hard drive. The evidence is offered to prove the accused's knowledge to commit the charged offenses, specifically that the training the accused presented to the platoon shows that the accused knew that information posted on the internet is accessible to and sought out by the enemy.
3. The uncharged misconduct occurred on or about June 2008. The accused deployed in October 2009. The date of inception of the charged misconduct is 1 November 2009. The Government proffers that the charged and uncharged misconduct are temporally proximate, 18 months apart, therefore, the probative value outweighs any danger of unfair prejudice under MRE 403.

4. The Defense stipulates to the facts as proffered by the government and that an adequate foundation has been laid by the Government to support a finding by the fact finder that the accused committed the prior acts. Defense argues that the evidence of the YouTube posting and the corrective training does not make a fact of consequence more or less probable and that the probative value of the evidence is outweighed by the danger of unfair prejudice under MRE 403.

MRE 404(b) act 2: statement made by the accused to SPC Jihrleah Showman between March and October 2009.

1. The Government proffers that SPC Showman supervised the accused from March 2009 and that SPC Showman counseled him on his military bearing shortly before they deployed in October 2009. During the counseling and in response to a question from SPC Showman about what the flag meant to the accused, the accused responded that the flag meant absolutely nothing to him and he had no allegiance to the United States or to its people.

2. The Government offers the transcript of SPC Showman's under oath testimony at the Article 32 investigation and a sworn statement given by SPC Showman to prove that she would testify similarly to support a finding by the fact-finder that the accused committed the uncharged conduct.

3. SPC Showman arrived at the accused's unit and began supervising him in March 2009. The statements were allegedly made after the accused and SPC Showman went to JRTC within months prior to the October 2009 deployment. There is no further specificity in the evidence before the Court. The inception date of the charged misconduct is 1 November 2009.

4. The Government offers the accused's statements to prove his state of mind. The fact that he had no loyalty to the United States is evidence of the accused's intent to commit the charged misconduct because he did not care if the enemy had access to the information that was posted on the internet. It is offered as circumstantial evidence relevant to prove the accused knowingly gave intelligence to the enemy for the Specification of Charge I, recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II, and that the accused stole, purloined or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.

5. The Defense posits that the government has presented no evidence the accused acted with animus toward the United States. The Defense further argues that SPC Showman's statement is unreliable because she did not report the accused's statement until after the accused assaulted her in May 2010 and when the charges against the accused were known. Additionally, the circumstances surrounding the making of the statement – formal counseling with requirement for the accused to attend – and the fact that SPC Showman did not know why the accused made the statements further make the probative value of the statement low. Finally, the Defense argues that lack of temporal proximity between the accused's statements to SPC Showman and the charged offenses and the circumstances surrounding the making of the statements render the probative value outweighed by the danger of unfair prejudice under MRE 403.

6. The Defense argues the Court should reject SPC Showman's prior statements and require her live testimony. The Defense did not request that the Government produce her for the motion. The Court considered the CD audiotape of SPC Showman's article 32 testimony proffered by the Defense.

MRE 404(b) act 3: May 2010 assault of SPC Showman resulting in an Article 15 for the accused and causing his removal from the 2-10 Mountain SCIF.

1. The accused received an article 15 for the May 2010 incident. SPC Showman and other witnesses testified about the incident during the Article 32. The Government proffers the uncharged misconduct is relevant to show the timeline of the accused's removal from the SCIF to the supply room and the mental state of the accused at the time. The timeline is relevant to prove the accused stole or converted the U.S. Forces-Iraq Global Address List charged in Specification 16 of Charge II. The Government further argues that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403 because there will be little distraction for the fact finder because the incident was a one-time event that will take little time to prove.

2. The Defense challenges the 2nd and 3rd prong of the MRE 404(b) test for admissibility because establishing the Government's timeline is not an appropriate purpose for MRE 404(b). The Defense further posits that any probative value of the evidence is outweighed by the danger of presenting uncharged misconduct to the fact-finder when the timeline can be established by eliciting testimony from SSG Bigelow that the accused was assigned to work for him in the supply room.

The Law:

MRE 404(b) allows evidence of uncharged misconduct when it is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the fact-finder infer that he is guilty as charged because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by MRE 404(b). *U.S. v. Castillo*, 29 M.J. 145 (C.M.A. 1989). In determining whether the proponent has introduced sufficient evidence to meet MRE 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.

To be admissible under the evidence rules, evidence of the uncharged misconduct must satisfy a three-part test:

- (1) The evidence must reasonably support a finding by the fact finder that the accused committed the uncharged crime, wrong, or act;
- (2) The evidence must make some fact of consequence more or less probable, although it cannot be offered only as impermissible character evidence; and

(3) The probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *U.S. v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). Factors that have been considered include the strength of proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence, distraction of the fact finder; time needed to prove the prior conduct; temporal proximity of the prior event; frequency of the acts, the presence of intervening parties and the relationship between the parties. *U.S. v. Berry*, 61 M.J. 91 (C.A.A.F. 2005).

To be relevant and admissible, the evidence must directly relate to some specific fact that is of consequence to the action, not to the general issue of criminality. It must be connected in time, place, and circumstance with the charged offense.

Conclusions of Law - MRE 404(h) act 1: June 2008 internet posting by the accused and corrective training.

1. The testimony of SFC (Ret) Madrid at the article 32 investigation and the slide show at enclosure 2 of the Government's motion provides sufficient evidence to support a finding by the fact finder that the accused posted the video on YouTube and drafted and presented the slide show to his platoon as corrective training.

2. The following are consequences in issue for the government to prove in the Charged Offenses: that the accused knowingly gave intelligence to the enemy for the Specification of Charge I, that the accused recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II. The fact that the accused received a reprimand for and was told to remove a video he placed on the internet using words such as "classified information" and "SCIF" and that he prepared a power point presentation entitled "Operations Security, (OPSEC)" is relevant to prove that the accused had the above listed *mens rea* for those charges. This uncharged conduct does not prove any consequence at issue regarding whether the accused stole, purloined or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.

3. The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. Although the uncharged conduct occurred approximately 17 months prior to the inception date of the charged misconduct, receiving a reprimand by a platoon sergeant for improperly posting a YouTube video referencing classified information terms and the preparation and presentation of an operations security class would be significant events for an AIT student. Both the removal of the improperly posted video and the powerpoint presentation are probative of the accused's knowledge of information security and his intent to disregard that knowledge. The evidence of the uncharged conduct will take little time and will not be distracting for the fact finder. There is no potential to present less prejudicial evidence. The Court will give a limiting instruction on the proper use of this evidence to mitigate any risk of unfair prejudice.

4. The posting of the video, the removal of the video, the reprimand by SFC (Ret) Madrid, and the corrective training class are admissible under MRE 404(b) for the reasons set forth in paragraph 2.

Conclusions of Law - MRE 404(b) act 2: March 2009 statement made by the accused to SPC Showman.

1. The transcript and audio taped testimony of SPC Showman's Article 32 and her sworn statement to CID are consistent and provide sufficient evidence to reasonably support a finding by the fact finder that the accused made the uncharged statements. The Defense has not presented any evidence that SPC Showman would testify any differently at trial.
2. The accused's statements were made between March and October 2009 after the accused went to JRTC. Thus, they were made between 6 and 2 months prior to the inception date of the charged misconduct. The accused's statements prior to his deployment are relevant to his state of mind during the deployment. The uncharged statements are admissions by the accused that are probative to a fact at issue. Evidence that the accused had no loyalty to the flag or to the United States or its people is evidence to prove that the accused did not care if the enemy had access to the information. This state of mind is relevant to prove that the accused knowingly gave intelligence to the enemy for the Specification of Charge I, that the accused recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II. These uncharged statements do not prove any consequence at issue regarding whether the accused stole, purloined, or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.
3. The probative value of the uncharged statements is high to prove the accused's knowledge and intent. The evidence will not take long to present and will not confuse or distract the fact finder. There is no potential to present less prejudicial evidence. Evidence of the accused's statements are prejudicial to the accused as is all inculpatory information. The issue is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The risk of unfair prejudice is that the fact finder will use the evidence for something other than the limited purpose for which it is introduced or to that they will convict the accused because they think he is a bad person because of the uncharged statements. The Court will instruct the members fully on the limited use of this evidence.
4. Evidence of the accused's statements to SPC Showman are admissible under MRE 404(b) to prove knowledge and *mens rea* as set forth in paragraph 2 of this section.

Findings of Fact and Conclusions of Law -MRE 404(b) act 3: May 2010 assault of SPC Showman causing the removal of the accused from the 2-10 Mountain SCIF.

1. The Article 15 package, the statements of SSG Bigelow and SPC Showman and the under oath Article 32 testimony of SPC Showman provide sufficient evidence to reasonably support a finding by the fact finder that the accused assaulted SPC Showman.

2. The evidence is relevant to present to the fact finder the reasons why the accused was removed from the SCIF to the supply room and had his clearance suspended and his access to classified information removed.

3. The probative value of the evidence is substantially outweighed by the risk of unfair prejudice under MRE 403 if presented during the Government's case in chief. There is the potential to present less prejudicial evidence to prove that the accused was removed from the SCIF to the supply room on or about 8 May 2010, that his security clearance was temporarily revoked, and that he did not have access to classified information while in the supply room. The Government can elicit testimony from SSG Bigelow that the accused was moved from the SCIF to the supply room and that he was not cleared for nor did he have access to classified information while he was working in the supply room.

4. Evidence that the accused assaulted SPC Showman or received an article 15 for the uncharged conduct is not admissible in the Government's case in chief.

MRE 404(b) Acts to Rebut Good Soldier Defense. The Government may use specific instances of conduct to cross examine witnesses presenting good Soldier character evidence on behalf of an accused with "have you heard" "did you know" "were you aware" questions so long as the Government has a good faith basis to inquire. Each of the three acts of uncharged misconduct provides that good faith basis.

RULING: The Government motion to admit evidence of MRE 404(b) acts 1 and 2 is **GRANTED**. The Government motion to admit evidence of MRE 404(b) act 3 is **DENIED**.

So **Ordered** this 30th day of August 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**RULING: Government and Defense
Motions for Judicial Notice of
Adjudicative Facts**

30 August 2012

The Government moves this Court to take Judicial notice of the following adjudicative facts: (1) Army Regulation (AR) 25-2, paragraphs 1-4, 1-5, 3-3, 4-5, 4-16, 4-17, and figure B-1; (2) AR 380-5, paragraphs 1-20, 1-21, 1-22, Chapter 2; Chapter 4 (Section I); Chapter 5 (Sections I and V); paragraphs 6-1, 6-2, 6-3, 7-4, 8-3, and 8-12; (3) AR 530-1, paragraphs 1-5, 1-6, 1-7, and 2-1; (4) 18 U.S.C. Section 641; 18 U.S.C. Section 793(e); 18 U.S.C. Section 1030(a)(1); (7) Executive Order 13526; and (8) Authorization for the Use of Military Force.

The Defense objects to the Court taking judicial notice of (8) Authorization for the Use of Military Force on the grounds that it is not relevant under MRE 401. Defense does not object to the Government motion for the Court to take judicial notice of the regulatory paragraphs in (1) – (7) above. The Government motion to take Judicial notice of adjudicative facts in (1) – (7) is **GRANTED**.

The Defense moves this Court to take Judicial Notice of the following adjudicative facts:

Excerpts From David Finkel's Book The Good Soldiers:

1. The Defense requests the Court to take judicial notice that David Finkel's book, The Good Soldiers, was published prior to the alleged leaks in this case and to take judicial notice that Mr. Finkel's book contains audio from the video charged in Specification 2 of Charge II.
2. The Government does not object to the Court taking judicial notice that David Finkel's book was published prior to the leak of the video in Specification 2 of Charge II. The Government objects to the Court taking judicial notice that David Frankel's book contains a verbatim transcript of the video charged in Specification 1 of Charge II.

Inadequacies with the Distributed Common Ground System-Army (DCGS-A);

1. The Defense moves the Court to take judicial notice of inadequacies with the Distributed Common Ground System-Army (DCGS-A), specifically that the system was prone to crashes and incapable of functioning when not connected to a network.
2. The Government opposes on the ground that the information supplied by the Defense does not support the proposition that inadequacies and issues with the DCGS-A were well known or even generally known within the military community.

The Law:

1. Military Rule of Evidence (MRE) 201 governs judicial notice of adjudicative facts. The judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *U.S. v. Needham*, 23 M.J. 383 (C.M.A. 1987); *U.S. v. Brown*, 33 M.J. 706 (A.C.M.R. 1991).
2. MRE 201(c) requires the military judge to take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information.
3. When the military judge takes judicial notice of adjudicative facts, the fact finder is instructed that they may, but are not required to, accept as conclusive any matter judicially noticed.
4. Judicial notice is of adjudicative facts. Judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *U.S. v. Anderson*, 22 M.J. 885 (A.F.C.M.R. 1985) (appropriate to take judicial notice of the existence of a treatment program at a confinement facility but not appropriate to take judicial notice of the quality of the program.).

Findings of Fact and Conclusions of Law: Government Request for Judicial Notice (8):

1. The Joint Resolution Authorizing the Use of Force (JRAUF), 107th Congress Public Law 40 is an adjudicative fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The Government has provided the Court with the necessary information under RE 201(c).
2. The Court finds the JRAUF is relevant evidence for the Government to prove who is an "enemy" for the purposes of the specification of Charge I, and Specification 1 of Charge II. The fact that the JRAUF, standing alone, does not prove who is an enemy does not detract from its relevance.
3. The Government motion for Judicial Notice as Adjudicative Fact for (8) is **GRANTED**.

Conclusions of Law: Defense Request for Judicial Notice of Excerpts from David Finkel's Book "The Good Soldiers".

1. As the Government does not object, the Defense motion for the Court to take judicial notice that David Finkel's book was published prior to the alleged leaks in this case is **GRANTED**.
2. The Defense provided the Court with a Washington Post article dated 6 April 2010 by David Finkel describing an excerpt from his book, The Good Soldiers. Defense did not provide the Court with the video charged in Specification 2 of Charge II to compare with the book or the article to determine whether the excerpt of the book is a verbatim transcript of the video.

3. The Defense motion for the Court to take judicial notice that Mr. Finkel's book contains a verbatim description of the audio from the video charged in Specification 2 of Charge II is **DENIED**.

4. The Court will take judicial notice of Mr. Finkel's book and relevant excerpts from pages of that book should the Defense provide the Court with the necessary information.

5. Linkages, argument, and legal conclusions regarding the contents of Mr. Finkel's book and the audio in the video are properly presented to the fact finder by the parties not by the Court.

Conclusions of Law: Defense Request for Judicial Notice of Inadequacies with the Distributed Common Ground System-Army (DCGS-A).

1. The Defense moves for the Court to take judicial notice of inadequacies with the DCGS-A, particularly that the DCGS-A system was prone to crashes and incapable of functioning when not connected to a network. The evidence provided to the Court in support of judicial notice does not demonstrate that these facts are generally known universally, locally, or in the area pertinent to the event or that these facts are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned. The facts are not judicially noticeable.

2. During oral argument, the Defense advised the Court that, in the alternative, the Defense would request the Court to take judicial notice of the enclosures supporting the request for judicial notice, particularly attachments:

- A. July 2011 information paper by HQDA DCS, G-2 Initiatives Group (DIG);
- B. Commander's Handbook Distributed Common Ground System – Army (DCG-A), March 30, 2009;
- C. Advanced Ace, Analytical Capability Joint Urgent Operational Need Statement, MG Michael T. Flynn, Deputy Chief of Staff, Intelligence, 2 July 2010.
- D. 19 July 2010 letter from 3 members of Congress to the Chairman and Ranking Members of the House Appropriations Committee;
- E. 28 July 2010 letter to the Chairman, House Appropriations Committee from COL Peter A. Newell, Director, Rapid Equipping Force;
- F. 25 August 2010 letter to COL Newell from Congress members Gabrielle Giffords and Adam Smith;
- G. 23 May 2011 from Adam Smith, Congress member to General Martin E. Dempsey;
- H. 29 June 2011 article from Politico entitled "Computer bugs hurt Army ops;"
- I. 22 September 2011 Article from unknown newspaper entitled "U.S. Army intel software crashes during exercise".

3. The Court will take judicial notice of Attachments A –G. The Court will not take judicial notice of attachments H and I. Both articles rely on anonymous sources and the publisher of the Attachment I article is unknown. Neither article demonstrates that these facts are generally known universally, locally, or in the area pertinent to the event or that these facts are capable of

accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.

4. Any linkages, argument, and legal conclusions regarding the contents of the judicially noticed documents are properly presented to the fact finder by the parties not by the Court.

RULING: The Government motion for judicial notice of Enclosures 1-8 is **GRANTED**. The Defense motion for judicial notice that David Finkel's book was published prior to the alleged leaks in this case is **GRANTED**. The Defense motion for judicial notice that Mr. Finkel's book contains a verbatim description of the audio from the video charged in Specification 2 of Charge II is **DENIED**. The Court will take judicial notice of Mr. Finkel's book and relevant excerpts from pages of that book should the Defense provide the Court with the necessary information. The Defense motion for judicial notice of inadequacies with the DCGS-A, particularly, that the DCGS-A system was prone to crashes and incapable of functioning when not connected to a network is **DENIED**. The alternative motion by the Defense for judicial notice of attachments A – I is **GRANTED IN PART**. The Court will judicially notice attachments A – G.

So **Ordered** this 30th day of August 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

**30 August 2012
Suspense: 14 September 2012**

TO: Dr. Kenneth Deherrera, Guthrie Army Community Hospital, Fort Drum, NY 13602

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during August 2009 and to produce all mental health records of PFC Manning, including notes, during August 2009.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.



Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Manning, Bradley E.)
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HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: Dr. Peter Resweber, Guthrie Army Community Hospital, Fort Drum, NY 13602

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during June 2009 and to produce all mental health records of PFC Manning, including notes, during June 2009.

3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.

5. You will comply with this court order no later than **14 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.



Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: Dr. Joseph Gretsche, Guthrie Army Community Hospital, Fort Drum, NY 13602

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during September 2009 and to produce all mental health records of PFC Manning, including notes, during September 2009.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.



Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: CPT Edan Critchfield, Guthrie Army Community Hospital, Fort Drum, NY 13602

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during May 2010 and to produce all mental health records of PFC Manning, including notes, during May 2010.

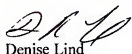
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.

5. You will comply with this court order no later than **14 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Fort Myer, Virginia 22211)


**Court Order
for Mental Health Professionals**

30 August 2012

TO: Dr. Martin Leibman, US Army Medical Activity, Fort Lee, VA 23801

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during December 2009 and to produce all mental health records of PFC Manning, including notes, during December 2009.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: CPT Michael Worsley, Medical Detachment (Rear), 9700 Tank Trail Road, Joint Base Lewis-McChord, WA 98433

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated from 30 December 2009 to 30 May 2010 and to produce all mental health records of PFC Manning, including notes, from 30 December 2009 to 30 May 2010.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind

Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: Dr. David Hutcheson-Tipton

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during June 2010 and to produce all mental health records of PFC Manning, including notes, during June 2010.


3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.

5. You will comply with this court order no later than **14 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

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UNITED STATES OF AMERICA)

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Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

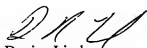
**Court Order
for Mental Health Professionals**

30 August 2012

TO: LCDR Eve Weber, US Naval Academy, Annapolis, MD 21402

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated from 31 May 2010 to 29 July 2010 and to produce all mental health records of PFC Manning, including notes, from 31 May 2010 to 29 July 2010.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

APPELLATE EXHIBIT 296
PAGE REFERENCED: _____
PAGE OF PAGES

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: CAPT Jonathan Richardson, Navy Hospital, Camp Pendleton, CA 92055

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case. .

2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated from 31 May 2010 to 29 July 2010 and to produce all mental health records of PFC Manning, including notes, from 31 May 2010 to 29 July 2010.


3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.

5. You will comply with this court order no later than **14 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

APPELLATE EXHIBIT 297
PAGE REFERENCED: _____
PAGE _____ OF _____ PAGES

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: COL Ricky Malone, Walter Reed National Naval Medical Center, Bethesda, MD 20307

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated 29 July 2010 to 31 May 2011 and to produce all mental health records of PFC Manning, including notes, 29 July 2010 to 31 May 2011.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.



Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

APPELLATE EXHIBIT 298
PAGE REFERENCE
PAGE OF PAGE

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)


**Court Order
for Mental Health Professionals**

30 August 2012

TO: CAPT William Hocter, Walter Reed National Naval Medical Center, Bethesda, MD 20307

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated from 29 July 2010 to 31 January 2011 and to produce all mental health records of PFC Manning, including notes, from 29 July 2010 to 31 January 2011.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.


Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

APPELLATE EXHIBIT 299
PAGE REFERENCED: _____
PAGE _____ **OF** _____ **PAGES**

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Court Order
for Mental Health Professionals**

30 August 2012

TO: LTC Robert Russell, Walter Reed National Naval Medical Center, Bethesda, MD 20307

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during April 2011 and to produce all mental health records of PFC Manning, including notes, during April 2011.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **14 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ordered this 30th day of August 2012 in chambers.



Denise Lind
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

APPELLATE EXHIBIT 300
PAGE REFERENCED: _____
PAGE ____ OF ____ PAGES

Appellate Exhibit 301
6 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 301

Enclosure 1

1 CD

classified

"SECRET (SPECIAL
HANDLING)"

ordered sealed for Reason 1
and Reason 7 (government)
Military Judge's Seal Order
dated 20 August 2013
is stored at the Office of the
General Counsel, Central
Intelligence Agency pursuant
to AE 500

Appellate Exhibit 301

Enclosure 2

1 CD

classified

"SECRET (SPECIAL
HANDLING)"

ordered sealed for Reason 1
and Reason 7 (government)
Military Judge's Seal Order
dated 20 August 2013
is stored at the Office of the
General Counsel, Central
Intelligence Agency pursuant
to AE 500

Appellate Exhibit 301
Enclosure 3
3 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 301
Enclosure 4
2 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

) Government *in camera* and *ex parte*
) Motion for Authorization of Redactions of
) Department of State Records under
) MRE 505(g)(2) and RCM 701(g)(2)

) Enclosure 5
) MFR for Meetings
)

) 14 September 2012



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY DISTRICT OF WASHINGTON
210 A STREET
FORT LESLEY J. MCNAIR, DC 20319-5013

ANJA-CL

13 September 2012

MEMORANDUM FOR RECORD

SUBJECT: WikiLeaks Mitigation Team Meetings - United States v. PFC Bradley Manning

1. On 5 September 2012 at the Department of State, I searched through documents related to the WikiLeaks Mitigation Team, and I annotated the dates and times the Team held meetings. For those meeting dates which did not have associated times, I only annotated the applicable dates. The information I found follows:

- a. 1 December 2010
- b. 3 December 2010, 1300-1400
- c. 7 December 2010, 1100-1200
- d. 9 December 2010, 1130-1215
- e. 14 December 2010
- f. 17 December 2010, 1330-1430
- g. 21 December 2010, 1030-1130, 1400-1500
- h. 23 December 2010, 1030-1130
- i. 5 January 2011
- j. 7 January 2011, 1100-1200
- k. 11 January 2011, 1100-1200
- l. 18 January 2011, 1530-1630
- m. 25 January 2011
- n. 1 February 2011
- o. 3 February 2011

- p. 4 February 2011
- q. 8 February 2011
- r. 15 February 2011
- s. 18 February 2011, 1300-1400
- t. 1 March 2011
- u. 15 March 2011
- v. 18 March 2011
- w. 29 March 2011, 1100-1200
- x. 30 March 2011
- y. 12 April 2011, 100-1200
- z. 15 April 2011
- aa. 26 April 2011, 1500-1600
- bb. 28 April 2011, 1400-1445
- cc. 30 June 2011
- dd. 21 July 2011, 1000-1100
- ee. 1 August 2011
- ff. 15 August 2011, 1530-1630
- gg. 30 August 2011, 1100-1200
- hh. 20 September 2011
- ii. 27 September 2011, 1100-1200
- jj. 31 October 2011

ANJA-CL

SUBJECT: WikiLeaks Mitigation Team Meetings – United States v. PFC Bradley Manning

kk. 3 November 2011

ll. 19 December 2011

2. The point of contact for this memorandum is the undersigned at (202) 685-1975.


CLAIRE JORNS
SGT, USA
Paralegal NCO

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

V

Manning, Bradley F.
U.S. Army, [REDACTED]
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211

)
)
) **RULING: GOVERNMENT**
) **IN CAMERA AND EX PARTE**
) **MOTIONS FOR**
) **AUTHORIZATION OF**
) **REDACTIONS/SUBSTITUTIONS**
) **FOR DHS, CIA, AND DOS**
) **RECORDS**

) DATED: 28 September 2012
)

The Government has moved *ex parte* under Military Rule of Evidence (MRE) 505(g)(2) and Rule for Courts-Martial (RCM) 701(g)(2) for the Court to conduct an *in camera* review of and authorize limited disclosure in the form of redactions for DHS and DOS records and a substitute summary for CIA records that the Court ordered the Government to produce to the Defense. The Defense opposes redaction or substitution.

The Court reviewed the Government's unclassified and classified motions for redactions to DHS and DOS records and a substitution summary for CIA records. The Court also conducted an *ex parte* review of the original documents and the proposed redactions and substitute. In coming to this ruling, the Court has considered the factors requested by the Defense in paragraph 7 of its 19 September 2012 response. The Court finds and rules as follows:

DHS records: The Government notified the Court that on 14 September 2012 all of the DHS records at issue were made available to the Defense except a single page with part of a line proposed for redaction. The information redacted is not relevant to the accused or to the charged offenses. The DHS records and the redacted page meet the Government's discovery obligations under *Brady* and RCM 701(a)(6) to disclose evidence tending to reasonably negate the guilt of the accused to an offense charged, reduce the degree of guilt to an offense charged, or reduce the punishment. The classified information in the redaction is not necessary to enable the accused to prepare for trial. The Government motion for redaction IAW RCM 701(g)(2) is granted.

CIA records: The proposed substitute is an accurate summary of the information in the original records and provides the Defense with the relevant facts necessary to prepare for trial. The classified information in the original records is not favorable to the accused, material to guilt or punishment, or necessary to enable the accused to prepare for trial IAW MRE 505(g)(2) or RCM 703(f). The Government motion to provide a substitute summary IAW MRE 505(g)(2) is granted.

DOS records:

a. The proposed redactions of the DOS documents in "Bucket 3" are of information that does not involve the accused or the charged offenses. The proposed substitute is an accurate summary of the information in the original records and provides the Defense with the relevant facts necessary to prepare for trial. The classified information in the original records is not favorable to the accused, material to

guilt or punishment, material to the preparation of the defense, or necessary to enable the accused to prepare for trial IAW MRE 505(g)(2) or RCM 703(f). The Government motion for redaction of irrelevant information is granted.

b. The vast majority of the proposed redactions of the DOS documents in "Bucket 2" are personally identifiable information (PII) of individuals in the Persons at Risk Group and are properly redacted IAW the Court's 19 July 2012 Ruling: Defense Motion to Compel DOS Discovery – Motion to Compel #2. There is one potential categorical exception. The Court will meet *ex parte* with Government counsel in an area appropriate for review of classified information on or before 10 October 2012. The "Bucket #2" documents will be produced for the meeting. A court reporter will transcribe the classified proceedings. The Government motion for proposed redactions in "Bucket #2" is granted in part. After the *ex parte* meeting, the Court will determine whether this ruling will be modified regarding certain redacted documents.

No redacted information in the DHS, CIA, or DOS records that has not been disclosed to the Defense will be used by the Government or by any Government witness during any portion of the trial to include rebuttal and rule of completeness.

The substitution of the DHS record, CIA records, DOS "Bucket #3" records, and the vast majority of the DOS "Bucket #2" records is sufficient for the Defense to adequately prepare for trial and represents an appropriate balance between the right of the Defense to discovery of relevant and necessary classified information and the protection of specific national security information, particularly intelligence sources and methods and the safety of individuals identified by DOS as persons at risk.

RULING: The motions by the Government to voluntarily provide limited disclosure under MRE 505(g)(2) for DHS, CIA, and DOS "Bucket #3" records is **GRANTED**. The Government motion to voluntarily provide limited disclosure under MRE 505(g)(2) for DOS "Bucket #2" records is **GRANTED IN PART**.

Ordered this 28th day of September 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, [REDACTED]
Headquarters and Headquarters Company, U.S.
Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

**DEFENSE RESPONSE TO
GOVERNMENT MOTION FOR
AUTHORIZATION OF
REDACTIONS OR
SUBSTITUTIONS FOR
FBI, CIA, DHS, AND DOS
RECORDS**

DATED: 19 September 2012

1. The Defense requests that this Court deny any proposed redactions or substitutions from the Federal Bureau of Investigation (FBI) file, the Central Intelligence Agency (CIA) records, the Department of Homeland Security (DHS) document, and the Department of State (DOS) records where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial.

2. The Defense does not request any witnesses for this motion, but does request that the Court consider Appellate Exhibit IX, XXXVI, CXVI, CXLVI, CXLVII, CLXXXII, CCXXII, 254, and 273 for the purposes of this motion.

3. The FBI, CIA, DHS, and DOS have not claimed a privilege under MRE 505(c). Therefore, the documents being considered by the Court are governed by *Brady*/RCM 701(a)(2), RCM 701(a)(6), RCM 701(g)(2), RCM 703(f), and MRE 505(g)(2).

4. The Court has found that the FBI, CIA, and DOS are “closely aligned” with the Government in this case. Appellate Exhibit XXXVI, p. 11. The Court has not been requested to make a similar determination regarding DHS records. However, the Defense would submit that DHS is also closely aligned with the Government in this case.

AFFILIATE EXHIBIT 303
 PAGE REFERENCED: _____
 PAGE OF PAGES

ARGUMENT

5. The Government's non-*ex parte* filings and redacted *in camera* motions provided to the Defense request the Court to authorize redactions and substitutions under either RCM 701(g)(2) or MRE 505(g)(2). Specifically, the Government requests the following:

- a) DHS Document. The Government requests the Court to "authorize a redaction of material within one DHS document under RCM 701(g)(2) that is neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f)." *See* Government *ex parte* Motion for Authorization of a Redaction of Material within One Department of Homeland Security Document under RCM 701(g)(2), dated 14 September 2012.
 - b) CIA Report. The Government requests the Court to "authorize a summary of information contained within CIA documents that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under RCM 703(f)." *See* Government *in camera* Motion for Authorization of a Summary of CIA Information under MRE 505(g)(2), dated 14 September 2012.
 - c) FBI File. The Government requests approval of redactions from the FBI file. The Government has apparently identified two folders of information with proposed redactions. The first folder, "Folder 3," apparently contains 184 documents and the second folder, "Folder 4," contains 90 documents. In each folder, the Government requests the Court to authorize the identified proposed redactions. The Government presumably basis its request on a belief that the redactions are neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f). *See* Supplement to Government *in camera* Motion for Authorization of Redactions for the FBI file under MRE 505(g)(2), dated 14 September 2012.
 - d) DOS Records. The Government requests the Court to "authorize a redaction of portions of Department documents under RCM 701(g)(2) that are neither favorable to the accused and material to guilt or punishment, relevant and necessary for production under RCM 703(f), subject to production under the Court's Order dated 19 July 2012, nor 'necessary to enable the accused to prepare for trial' under MRE 505(g)(2)." *See* Government *in camera* and *ex parte* Motion for Authorization of a Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), dated 14 September 2012.
6. As part of its request, the Government provided the following additional detail:
- a) DHS Document. The Government has indicated that "it will not use the redacted information during any portion of the trial." *See* Government *ex parte* Motion for Authorization of a Redaction of Material within One Department of Homeland Security Document under RCM 701(g)(2), p. 2.
 - b) CIA Report. The Government has indicated that it "will not use any portion of these CIA documents not disclosed to the defense during any portion of the trial." *See* Government *in camera* Motion for Authorization of a Summary of CIA Information under MRE 505(g)(2), p. 3.
 - c) FBI File. The Government has indicated that it "will not use any portion of the redacted information *not disclosed to the defense* during any portion of the trial." *See* Supplement

to Government *in camera* Motion for Authorization of Redactions for the FBI file under MRE 505(g)(2), p. 2. The caveat “*not disclosed to the defense*” ordinarily would not be troubling to the Defense. However, the Government placed emphasis on the fact that it did not identify whether the proposed redactions may have already been provided to the Defense is some other form of discovery unrelated to the FBI file. *Id.* at p. 1 (“The United States did not identify whether proposed redactions were made available to the defense in discovery from another source, but instead has altered the redactions in the FBI file so that information provided to the defense in discovery from other sources is also available to the defense in the FBI file.”) (emphasis in original). The Government’s statement, besides being confusing, appears to provide it with the ability to use redacted information during other portions of the trial if it can point to how the redacted information was provided to the Defense in discovery apart from the FBI file. If this is indeed the Government’s position, the Defense requests the Court to not allow the Government to redact this information. If the information has been provided to the Defense in other forms of discovery, then the Government’s basis for redacting it in the FBI file is no longer a consideration. Additionally, by allowing the proposed redactions, the Government would benefit from the confusion that would undoubtedly follow given the inability of the Court and the Defense to identify which information has been previously provided in the voluminous discovery and which information has not. Whether the Government is able to use any redacted information from the FBI file should not be placed into such doubt. As such, the Court should require the Government to identify any such information and subsequently deny the Government’s request for authorization of the identified redactions.

- d) DOS Records. The Government has indicated that it “will not use any portion of the redacted information not disclosed to the defense during any portion of the trial. This includes rebuttal and rule of completeness if the defense introduces or references anything in the substitution.” *See* Government *in camera* and *ex parte* Motion for Authorization of a Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), p. 5.

7. The Government requests this Court to approve of its determination that the Defense is not entitled to discovery of the redacted or substituted information. In considering whether the proposed substitutions or redactions are sufficient, the Court must determine if the disclosure of the classified information itself is necessary to enable the accused to prepare for trial. MRE 505(g)(2). In making this determination, the Defense requests that this Court consider the analysis proposed by the Defense in Appellate Exhibit CLXXXII and the following factors adopted by the Court in Appellate Exhibit CXLVI:

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government’s very broad reading of many of these offenses?

- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? Is so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

CONCLUSION

8. The Defense requests that this Court deny any proposed redactions or substitutions from the DHS document, CIA Report, FBI file, and DOS records where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial.

Respectfully submitted,



DAVID E. COOMBS
Civilian Defense Counsel

UNITED STATES OF AMERICA)

v.)

Supplement to
Prosecution Article 13 Witness ListManning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)


4 September 2012

The United States may call the following witness to testify at the Article 13 motion hearing of the above-captioned court-martial:


Maj Timothy Zelek, Headquarters and Service Battalion, Quantico, VA, 22134,
(703) 784-2902

The United States reserves the right to supplement this witness lists based on the Defense's supplemental witness list, and supplemental motions.

If the Defense intends to produce the witness who is listed above, the Defense must provide a separate, appropriate request for that witness in accordance with Rule for Courts-Martial (RCM) 703 and the standard articulated in United States v. Rockwood, 52 M.J. 98, 105 (1999) that a witness request include a "synopsis of expected testimony," not merely a list of topics to be covered. If necessary for a particular witness employed by the United States Government, the Defense shall also comply with 5 U.S.C. § 301 and Touhy v. Ragen, 340 U.S. 462 (1951).


ALEXANDER VON ELTEN
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 4 September 2012.


ALEXANDER VON ELTEN
CPT, JA
Assistant Trial Counsel

THE GOOD SOLDIERS

DAVID FINKEL

WINNER OF THE PULITZER PRIZE

Finkel has made art out of a defining moment in history. You will be able to take this book down from the shelf years from now and say: "This is what happened. This is what it felt like."

—DOUG STANTON *The New York Times Book Review*

PICADOR



APPELLATE EXHIBIT 305
PAGE REFERENCED: _____
PAGE ____ OF ____ PAGES

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Portions of this book originally appeared, in different form, in *The Washington Post*.

Top photograph on page 118 courtesy of the U.S. Army. All other photographs courtesy of the author.

Designed by Abby Kogan

The Library of Congress has cataloged the Farrar, Straus and Giroux edition as follows:

Finkel, David, 1955—

The good soldiers / by David Finkel.

p. cm.

ISBN 978-0-374-16573-4 (hardcover)

1. Iraq War, 2003—Campaigns—Iraq—Baghdad. 2. Battles—Baghdad—History—21st century. 3. Soldiers—United States—Biography. 4. United States. Army—Military life—History—21st century. 5. Counterinsurgency—Iraq—Baghdad—History—21st century. I. Title.

DS79.764.U6 F56 2009

956.7044'3420973—dc22

2009019391

Picador ISBN 978-0-312-43002-3

First published in the United States by Sarah Crichton Books, an imprint of Farrar, Straus and Giroux

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Iraqi religious leader, which said, in part: "Yes, O Bush, we are the ones who kidnap your soldiers and kill them and burn them. We will continue, God willing, so long as you only know the language of blood and the scattering of remains. Our soldiers love the blood of your soldiers. They compete to chop off their heads. They like the game of burning down their vehicles."

What a freak show this place was. And maybe that was the explanation for the pile of weapons Kauzlarich was looking at, that it deserved no understanding whatsoever.

Weapons in a mosque, including an IED to burn vehicles and kill soldiers.

Unbelievable.

Shadi ghabees. Cooloh khara. Allah ye sheelack.

"Shukran," Kauzlarich said out loud to the general, keeping his other thoughts to himself. He made his way to his Humvee to figure out where to go next and was just settling into his seat when he was startled by a loud burst of gunfire.

"Machine gun fire," he said, wondering who was shooting.

But it wasn't machine gun fire. It was bigger. More thundering. It was coming from above, just to the east, where the AH-64 Apache helicopters were circling, and it was so loud the entire sky seemed to jerk.

Now came a second burst.

"Yeah! We killed more motherfuckers," Kauzlarich said.

Now came more bursts.

"Holy shit," Kauzlarich said.

It was the morning's third version of war.

One minute and fifty-five seconds before the first burst, the two crew members in one of the circling Apaches had noticed some men on a street on Al-Amin's eastern edge.

"See all those people standing down there?" one asked.

"Confirmed," said the other crew member. "That open courtyard?"

"Roger," said the first.

Everything the crew members in both Apaches were saying was being recorded. So were their communications with the 2-16. To avoid confusion, anyone talking identified himself with a code word. The crew members in the lead Apache, for example, were Crazy Horse 1-8. The 2-16 person they were communicating with most frequently was Hotel 2-6.

There was a visual recording of what they were seeing as well, and what they were seeing now—one minute and forty seconds before they fired their first burst—were some men walking along the middle of a street, several of whom appeared to be carrying weapons.

All morning long, this part of Al-Amin had been the most hostile. While Tyler Andersen had been under a shade tree in west Al-Amin, and Kauzlarich had dealt with occasional gunfire in the center part, east Al-Amin had been filled with gunfire and some explosions. There had been reports of sniper fire, rooftop chases, and rocket-propelled grenades being fired at Bravo Company, and as the fighting continued, it attracted the attention of Namir Noor-Eldeen, a twenty-two-year-old photographer for the Reuters news agency who lived in Baghdad, and Saeed Chmagh, forty, his driver and assistant.

Some journalists covering the war did so by embedding with the U.S. military. Others worked independently. Noor-Eldeen and Chmagh were among those who worked independently, which meant that the military didn't know they were in Al-Amin. The 2-16 didn't know, and neither did the crews of the Apaches, which were flying high above Al-Amin in a slow, counter-clockwise circle. From that height, the crews could see all of east Al-Amin, but the optics in the lead Apache were now focused

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tightly on Noor-Eldeen, who had a camera strung over his right shoulder and was centered in the crosshairs of the Apache's thirty-millimeter automatic cannon.

"Oh yeah," one of the crew members said to the other as he looked at the hanging camera. "That's a weapon."

"Hotel Two-six, this is Crazy Horse One-eight," the other crew member radioed in to the 2-16. "Have individuals with weapons."

They continued to keep the crosshairs on Noor-Eldeen as he walked along the street next to another man, who seemed to be leading him. On the right side of the street were some trash piles. On the left side were buildings. Now the man with Noor-Eldeen guided him by the elbow toward one of the buildings and motioned for him to get down. Chmagh followed, carrying a camera with a long telephoto lens. Behind Chmagh were four other men, one of whom appeared to be holding an AK-47 and one of whom appeared to be holding a rocket-propelled grenade launcher. The crosshairs swung now away from Noor-Eldeen and toward one of those men.

"Yup, he's got one, too," the crew member said. "Hotel Two-six, Crazy Horse One-eight. Have five to six individuals with AK-47s. Request permission to engage."

It was now one minute and four seconds before the first burst.

"Roger that," Hotel 2-6 replied. "We have no personnel east of our position, so you are free to engage. Over."

"All right, we'll be engaging," the other crew member said.

They couldn't engage yet, however, because the Apache's circling had brought it to a point where some buildings now obstructed the view of the men.

"I can't get them now," a crew member said.

Several seconds passed as the lead Apache continued its slow curve around. Now it was almost directly behind the building

that Noor-Eldeen had been guided toward, and the crew members could see someone peering around the corner, looking in their direction and lifting something long and dark. This was Noor-Eldeen, raising a camera with a telephoto lens to his eyes.

"He's got an RPG."

"Okay, I got a guy with an RPG."

"I'm gonna fire."

But the building was still in the way.

"Goddamnit."

The Apache needed to circle all the way around, back to an unobstructed view of the street, before the gunner would have a clean shot.

Ten seconds passed as the helicopter continued to curve.

"Once you get on it, just open—"

Almost around now, the crew could see three of the men. Just a little more to go.

Now they could see five of them.

"You're clear."

Not quite. One last tree was in the way.

"All right."

There. Now all of the men could be seen. There were nine of them, including Noor-Eldeen. He was in the middle, and the others were clustered around him, except for Chmagh, who was on his cell phone a few steps away.

"Light 'em all up."

One second before the first burst, Noor-Eldeen glanced up at the Apache.

"Come on—fire."

The others followed his gaze and looked up, too.

The gunner fired.

It was a twenty-round burst that lasted for two seconds.

"Machine gun fire," Kauzlarich said quizzically, a half mile away, as the sky seemed to jerk, and meanwhile, here in east

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Al-Amin, nine men were suddenly grabbing their bodies a
street blew up around them, seven were now falling to the ground
dead or nearly dead, and two were running away—Chmagh and
Noor-Eldeen.

The gunner saw Noor-Eldeen, tracked him in the crosshairs,
and fired a second twenty-round burst, and after running per-
haps twelve steps, Noor-Eldeen dove into a pile of trash.

"Keep shooting," the other crew member said.

around, back to an
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There was a two-second pause, and then came the third burst.
The trash all around where Noor-Eldeen lay facedown erupted.
A cloud of dirt and dust rose into the air.

"Keep shooting."

nued to curve.

ee of the men. Just

There was a one-second pause, and then came the fourth
burst. In the cloud, Noor-Eldeen could be seen trying to stand,
and then he simply seemed to explode.

All of this took twelve seconds. A total of eighty rounds had
been fired. The thirty-millimeter cannon was now silent. The pi-
lot was silent. The gunner was silent. The scene they looked
down on was one of swirling and rising dirt, and now, barely vis-
ible as some of the swirling dirt began to thin, they saw a person
who was taking cover by crouching against a wall.

It was Chmagh.

There were nine of
middle, and the oth-
magh, who was on

He stood and began to run. "I got him," someone said, and
now he disappeared inside a fresh explosion of dirt, which rose
and mingled with what was already in the air as the Apaches con-
tinued circling and the crew members continued to talk.

"All right, you're clear," one said.

"All right, I'm just trying to find targets again," another said.

"We have a bunch of bodies laying there."

"All right, we got about eight individuals."

"Yeah, we definitely got some."

"Yeah, look at those dead bastards."

"Good shooting"

ldeen glanced up at

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two seconds.
zically, a half mile
while, here in east

"Thank you."

The smoke was gone now and they could see everything clearly: the main pile of bodies, some prone, one on haunches, one folded into impossible angles; Noor-Eldeen on top of the trash; Chmagh lying motionless on his left side.

"Bushmaster Seven, Crazy Horse One-eight," they radioed to Bravo Company, whose soldiers were on their way to the site. "Location of bodies Mike Bravo Five-four-five-eight-eight-six-one-seven. They're on a street in front of an open courtyard with a bunch of blue trucks, a bunch of vehicles in a courtyard."

"There's one guy moving down there, but he's wounded," someone now said, looking down, scanning the bodies, focusing on Chmagh.

"This is One-eight," the crew member continued on the radio. "We also have one individual who appears to be wounded. Trying to crawl away."

"Roger. We're gonna move down there," Bravo Company replied.

"Roger. We'll cease fire," the Apache crew responded and continued to watch Chmagh, still alive somehow, who in slow motion seemed to be trying to push himself up. He got partway and collapsed. He tried again, raising himself slightly, but again he went down. He rolled onto his stomach and tried to get up on his knees, but his left leg stayed extended behind him, and when he tried to lift his head, he could get it only a few inches off the ground.

"Do you see a shot?" one of the crew members said.

"Does he have a weapon in his hands?" the other said, aware of the rules governing an engagement.

"No, I haven't seen one yet."

They continued to watch and to circle as Chmagh sank back to the ground.

"Come on, buddy," one of them urged.

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"All you gotta do is pick up a weapon," another said.

Now, as had happened earlier, their circling brought them behind some buildings that obstructed their view of the street, and when they were next able to see Chmagh, someone they had glimpsed running up the street was crouching over him, a second man was running toward them, and a Kia passenger van was approaching.

"Bushmaster, Crazy Horse," they radioed in urgently. "We have individuals going to the scene. Looks like possibly picking up bodies and weapons. Break—"

The van stopped next to Chmagh. The driver got out, ran around to the passenger side, and slid open the cargo door.

"Crazy Horse One-eight. Request permission to engage."

Ready to fire, they waited for the required response from Bravo Company as two of the passersby tried to pick up Chmagh, who was facedown on the sidewalk. One man had Chmagh by the legs. The second man was trying to turn him over onto his back. Were they insurgents? Were they people only trying to help?

"Come on! Let us shoot."

Now the second man had hold of Chmagh under his arms.

"Bushmaster, Crazy Horse One-eight," the Apache said again.

But there was still no response as the driver got back in his seat and the two men lifted Chmagh and carried him around the front of the van toward the open door.

"They're taking him."

"Bushmaster, Crazy Horse One-eight."

They had Chmagh at the door now.

"This is Bushmaster Seven. Go ahead."

They were pulling Chmagh to his feet.

"Roger, we have a black bongo truck picking up the bodies. Request permission to engage."

They were pushing Chmagh into the van.

"This is Bushmaster Seven. Roger. Engage."

He was in the van now, the two men were closing the door, and the van was beginning to move forward.

"One-eight, clear."

"Come on!"

A first burst.

"Clear."

A second burst.

"Clear."

A third burst.

"Clear."

Ten seconds. Sixty rounds. The two men outside of the van ran, dove, and rolled against a wall as some of the rounds exploded around them. The van continued forward a few yards, abruptly jerked backward, crashed into the wall near the men, and was now enveloped in smoke.

"I think the van's disabled," a crew member said, but to be sure, now came a fourth burst, a fifth, and a sixth—ten more seconds, sixty more rounds—and that, at last, was the end of the shooting.

Now it was a matter of waiting for Bravo Company's soldiers to arrive on the scene, and here they came, in Humvees and on foot, swarming across a thoroughly ruined landscape. The battlefield was theirs now, from the main pile of bodies, to the trash pile with Noor-Eldeen, to the shot-up houses and buildings, to the van—inside of which, among the bodies, they discovered someone alive.

"Bushmaster Six, Bravo Seven," a Bravo Company soldier called over the radio. "I've got eleven Iraqi KIAs, one small child wounded. Over."

The Apache crews were listening.

"Ah, damn," one of them said.

"We need to evac this child," Bravo Seven continued. "She's

got a wound to the back to get evacuated. Over."

"Well, it's their fault," a crew member said.

"That's right," the crew continued to circle and

They saw more Humvees onto the trash pile, right onto Noor-Eldeen's body.

"That guy just drove

"Did he?"

"Yeah."

"Well, they're dead."

They watched a soldier wounded girl and run away that was going to evacuate.

They watched another minutes later cradling a boy who had been dislocated father's, which was dragged because that was how a

And then they flew in and more Bravo Company March, the soldier who had climbed a guard tower said quietly and nervously an IED in all this shit."

Since then, March had died on June 25, when Jr. Craig's memorial service later, as March saw all the open, insides exposed, so he would later explain—

got a wound to the belly. Doc can't do anything here. She needs to get evac'd. Over."

"Well, it's their fault for bringing their kids to a battle," a crew member said.

"That's right," the other said, and for a few more minutes they continued to circle and watch.

They saw more Humvees arriving, one of which drove up onto the trash pile, right over the part containing what was left of Noor-Eldeen's body.

"That guy just drove over a body."

"Did he?"

"Yeah."

"Well, they're dead, so—"

They watched a soldier emerge from the van cradling the wounded girl and run with her in his arms to the army vehicle that was going to evacuate her to a hospital.

They watched another soldier emerge from the van a few minutes later cradling a second wounded child, this one a little boy who had been discovered under a body presumed to be his father's, which was draped over the boy, either protectively or because that was how a dead man happened to fall.

And then they flew on to another part of Al-Amin as more and more Bravo Company soldiers arrived, one of whom was Jay March, the soldier who on the battalion's very first day in Iraq had climbed a guard tower, peeked out at all of the trash, and said quietly and nervously, "We ain't ever gonna be able to find an IED in all this shit."

Since then, March had learned how prophetic he was, especially on June 25, when an EFP killed his friend Andre Craig, Jr. Craig's memorial service had been on July 7, and now, five days later, as March saw all of the bodies scattered around, blown open, insides exposed, so gruesome, so grotesque, he felt—as he would later explain—"happy. It was weird. I was just really

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very happy. I remember feeling so happy. When I heard they were engaging, when I heard there's thirteen KIA, I was just so happy, because Craig had just died, and it felt like, you know, we got 'em."

As the Apaches peeled off, he and another soldier went through a gate in the wall that the van had crashed into and against which Chmagh had tried to take cover.

There, in the courtyard of a house, hidden from street view, they found two more injured Iraqis, one on top of the other. As March looked closer at the two, who might have been the two who had been lifting Chmagh into the van, who as far as March knew had spent the morning trying to kill American soldiers, he realized that the one on the bottom was dead. But the one on top was still alive, and as March locked eyes with him, the man raised his hands and rubbed his two forefingers together, which March had learned was what Iraqis did when they wanted to signal the word *friends*.

So March looked at the man and rubbed his two forefingers together, too.

And then dropped his left hand and extended the middle finger of his right hand.

And then said to the other soldier, "Craig's probably just sitting up there drinking beer, going, 'Hah! That's all I needed.'"

And that was the day's third version of war.

As for the fourth version, it occurred late in the day, back on the FOB, after Kauzlarich and the soldiers had finished their work in Al-Amin.

They knew by now about Chmagh and Noor-Eldeen.

They had brought back Noor-Eldeen's cameras and examined the images to see if he was a journalist or an insurgent.

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They had gotten the video and audio recordings from the
Apaches and had reviewed them several times.

They had looked at photographs taken by soldiers that showed
AK-47s and a rocket-propelled grenade launcher next to the dead
Iraqis.

They had reviewed everything they could about what had
prefaced the killings in east Al-Amin, in other words—that sol-
diers were being shot at, that they didn't know journalists were
there, that the Apache crew had followed the rules of engagement
when it fired at the men with weapons, at the journalists, and at
the van with the children inside—and had concluded that every-
one had acted appropriately.

Had the journalists?

That would be for others to decide.

As for the men who had tried to help Chmagh, were they
insurgents or just people trying to help a wounded man?

They would probably never know.

What they did know: the good soldiers were still the good
soldiers, and the time had come for dinner.

"Crow. Payne. Craig. Gajdos. Cajimat," Kauzlarich said on the
walk to the DFAC. "Right now? Our guys? They're thinking,
'Those guys didn't die in vain. Not after what we did today.'"

Inside the DFAC, the TVs were tuned to Bush's press con-
ference, which had begun in Washington just a few minutes
before.

"Our top priority is to help the Iraqis protect their popula-
tion," Bush was saying, "so we've launched an offensive in and
around Baghdad to go after extremists, to buy more time for
Iraqi forces to develop, and to help normal life and civil society
take root in communities and neighborhoods throughout the
country.

"We're helping enhance the size, capabilities, and effectiveness of the Iraqi security forces so the Iraqis can take over the defense of their own country," he continued. "We're helping the Iraqis take back their neighborhoods from the extremists . . ."

This was the fourth version of war.

Kauzlarich watched as he ate. "I like this president," he said.

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UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Prosecution Response to
Defense Supplement
to Motion to Dismiss
for Unlawful Pretrial Punishment

7 September 2012

RELIEF SOUGHT

The United States respectfully requests that the Court deny, in part, the Defense Motion to Dismiss for Unlawful Pretrial Punishment (Defense Motion) and the Defense Supplement to Article 13 Motion (Defense Supplement).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. *See* Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c) (2012). The Defense bears the burden of establishing an entitlement to sentence credit for a violation of Article 13. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (citing RCM 905(c)(2)). The nonbinding precedent cited by the Defense discusses the standard the Defense must meet to raise the issue, not decide the issue.¹ *See United States v. Scaramone*, 52 M.J. 539, 543-44 (N-M. Ct. Crim. App. 1999) (citing *United States v. Cordova*, 42 C.M.R. 466 (A.C.M.R. 1970)) ("To raise the issue [of a violation of Article 13], the burden is on the appellant to present evidence to support his claim of illegal pretrial punishment. Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation 'beyond the point of . . . inconclusiveness.'" (emphasis added). Accordingly, the Defense, as the moving party, bears the burden to prove a factual matter by a preponderance of the evidence. *See King*, *supra*.

WITNESSES/EVIDENCE

The United States requests that the Court consider the listed Appellate Exhibits and the Charge Sheet.

The United States may call the following witnesses to testify during the Article 13, UCMJ (Article 13) hearing:

1. CWO4 James Averhart, Brig Officer, Security Battalion, 29 July 2012 to 15 January 2011
2. CWO2 Denise Barnes, Brig Officer, Security Battalion, 15 January 2011 to Transfer to JRCF (19 April 2011)

¹ The United States stipulates that the Defense has presented enough evidence to raise, but not decide, the issue of a potential violation of Article 13, UCMJ.

3. MSgt Craig Blenis, Programs Chief, 29 July 2010 to Transfer to JRCF
4. CPT Joseph Casamatta, Commander, HHC, USAG, 29 July 2010 to 1 July 2012
5. Col Daniel Choike, Commander, MCBQ, 29 July 2010 to Transfer to JRCF
6. LCpl Jonathan Cline, Guard/Escort, during Incident on 18 January 2011
7. COL Carl Coffman, Commander, USAG, Ft Myer, 29 July 2010 to Present
8. GySgt William Fuller, Admin Chief, 29 July 2010 to Transfer to JRCF
9. CWO5 Abel Galaviz, Head, Corrections Section, PP&O, PS Division, PSL Branch, 29 July 2010 to Transfer to JRCF
10. SSG Ryan Jordan, Army Liaison at MCBQ, 29 July 2010 to Transfer to JRCF
11. MSgt Brian Papakie, Brig Supervisor, 29 July 2010 to Transfer to JRCF
12. CAPT Jonathan Richardson, Medical Officer at Theater Field Confinement Facility in Kuwait (TFCF), 27 May 2010 to 28 July 2010
13. LTC Robert Russell, General Psychiatrist at MCBQ, April 2011
14. Mr. Joshua Tankersly, Guard/Escort, during Incident on 18 January 2011
15. GM2 Terrance Webb, Duty Brig Supervisor, during Incident on 18 January 2011
16. LCDR Eve Weber, Medical Officer at TFCF, 27 May 2010 to 28 July 2010
17. ISG Bruce Williams, ISG, HHC, USAG, 29 July 2010 to Present
18. Maj Timothy Zelek, Deputy Inspector General Marine Corps Base Quantico, December 2010

FACTS

The United States stipulates to charges in Defense Motion ¶ 6. *See* Charge Sheet. The United States disputes that the accused was held in conditions tantamount to solitary confinement.

The United States stipulates to Defense Motion ¶¶ 7-9.

The United States stipulates to Defense Motion ¶ 10. The United States and Defense have proposed multiple filing dates, to include 15 June 2012, 27 July 2012, and 7 September 2012 for the Defense Motion to Dismiss for Unlawful Pretrial Punishment (Defense Article 13 Motion). *See* Appellate Exhibit I, Appellate Exhibit XX, Appellate Exhibit XLIV, Appellate Exhibit XLV, Appellate Exhibit CXIII.

The United States stipulates to Defense Motion ¶ 11.

The United States stipulates to Defense Motion ¶ 12; however, the United States disputes the Defense's description of the contents of the emails.

LtGen Flynn did not issue an order to keep the accused in maximum custody (MAX), suicide risk (SR), or prevention of injury (POI). *See* proffered testimony of Col Choike. LtGen Flynn received reports regarding the accused's confinement. *See id.*

Col Choike did not issue an order to keep the accused in MAX, SR, or POI. *See* proffered testimony of Col Choike. Col Choike received reports regarding the accused's confinement. *See id.*

Col Oltman did not issue an order to keep the accused in MAX, SR, or POI. *See* proffered testimony of Col Oltman. Col Oltman received reports regard the accused's confinement. *See id.*

CWO4 Averhart independently decided the accused's custody classification and status based on his judgment; CWO4 Averhart was not influenced by an order from any senior officer. *See* proffered testimony of CWO4 Averhart.

CWO2 Barnes independently decided the accused's custody classification and status based on her judgment; CWO2 Barnes was not influenced by an order from any senior officer. *See* proffered testimony of CWO2 Barnes.

The members of the Classification and Assignment (C&A) Boards exercised independent judgment and were not influenced by a commanding officer. *See* proffered testimony of MSgt Blenis, GySgt Fuller, SSG Jordan.

The IG report was initiated by Maj Zelek of his own volition. *See* proffered testimony of Maj Zelek. The report's conclusions were reached independently. *See id.*

CWO5 Galaviz's report and its conclusions were reached independently. *See* proffered testimony of CWO5 Galaviz.

LEGAL AUTHORITY AND ARGUMENT

Due process protects a servicemember from punishment prior to conviction and sentencing. *United States v. Adcock*, 65 M.J. 18, 19-20 (C.A.A.F. 2007) (citing *United States v. McCarthy*, 47 M.J. 162, 164-65 (C.A.A.F. 1997)). The nature of the government function and accused's interest affected by the governmental action determine the procedures required to satisfy due process. *See Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S.886, 895 (1961)). Arbitrary or purposeless restrictions violate Article 13, UCMJ (Article 13). *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). Furthermore, a government agency must abide by its own regulations "where the underlying purpose of such regulations is the protection of personal liberties or interests." *Adcock*, 65 M.J. at 23 (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). Arbitrarily placing a detainee in restrictive conditions without consideration of factors relevant to the detainee violates Article 13 and due process. *See United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011) (citing *United States v. King*, 61 M.J. 225, 228-29 (C.A.A.F. 2005)); *see also United States v. Best*, 61 M.J. 376, 390 (C.A.A.F. 2005) (citing *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (deciding that although servicemember does not have a constitutional right to a sanity board, the board, once ordered, must be conducted in a manner consistent with due process, which includes the right to a fair and impartial adjudicator).

Independent decisions reached during administrative processes uphold the accused's right to procedural due process. The Brig's decision makers, to include the Brig commanding officers, CWO4 Averhart and CWO2 Barnes, exercised independent judgment. The members of

the C&A Boards also reached conclusions based on their independent assessments. The emails cited by the Defense describe reports sent to members in the Marine Corps Base Quantico (MCBQ) chain of command.² The chain of command was reasonably interested in a matter garnering media attention. The emails demonstrate the concern within the chain of command for a Soldier's safety and interest in being informed. Accordingly, the exercise of command responsibility does not amount to improper influence. The Brig commanding officers and staff will testify that they exercised independent judgment in making their recommendations and determinations. Therefore, the chain of command's limited involvement did not violate procedural due process.

Under Navy Instructions, commanding generals of Marine Corps installations maintain responsibility for confinement facilities. U.S. Department of Navy Instruction 1640.9C (SECNAVINST 1640.9C) Art. 1201(5)(d) at 1-6 to 1-7 (3 January 2006) ("[C]ommanding generals of Marine Corps installations, through the chain of command, are directly responsible for operations of confinement facilities within their claimancy/installation."); *see also* U.S. Department of the Army Regulation 190-47 (AR 190-47), The Army Corrections System, para. 1-4(h) (15 June 2006) (stating that commanders of installations are responsible for the safe operation of the local Army correctional facilities and compliance with policies set forth in AR 190-47). Furthermore, Navy Instructions describe chain of command involvement as "essential" to the operation of confinement facilities. SECNAVINST 1640.9C Art. 1201(5)(d) at 1-6.

The Defense alleges that concern for the accused's safety and receipt of reports on the accused's confinement amounted to improper influence. *See* Defense Supplement ¶¶ 20, 31, 33. A commander's receipt of reports does not amount to unlawful command influence because the commanders at MCBQ did not accuse the accused nor convene a court-martial. *See United States v. Ashby*, 68 M.J. 108, 128-29 (C.A.A.F. 2009) (holding that interest in the administrative proceeding as part of official capacity is not unlawful command influence). Here, the chain of command at MCBQ properly maintained awareness and received reports as commanding officers. Indeed, the involvement of the chain of command is explicitly encouraged by the Navy Instructions. *See* SECNAVINST 1640.9c Art. 1201(5)(d) at 1-6. Accordingly, the limited involvement by the chain of command in the accused's confinement did not amount unlawful or improper influence.

² During the accused's confinement, LtGen Flynn was the Commanding General, Marine Corps Combat Development Command. Col Choike was the garrison commander, Marine Corps Base Quantico. Col Oltman was the commanding officer of the MCBQ Security Battalion, which consisted of the pretrial confinement facility (the Brig), military police, and fire department at MCBQ. Therefore, the chain of command went up from the Brig commanding officer, CWO4 Averhart or CWO2 Barnes, to Col Oltman as head of Security Battalion, to Col Choike as garrison commander of MCBQ, to LtGen Flynn.

CONCLUSION

The accused is entitled to no more than seven days confinement credit for the time he spent on SR after a psychiatrist recommended removing him from SR. Therefore, the accused's confinement did not otherwise violate Article 13 and the accused is not entitled to additional confinement credit. For the foregoing reasons, the United States respectfully requests that the Court deny, in part, the Defense Motion and Defense Supplement.



ALEXANDER S. VON ELTEN
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 7 September 2012.



ALEXANDER S. VON ELTEN
CPT, JA
Assistant Trial Counsel

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Kevin Moore

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to respond to all questions asked by the prosecution and the defense in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of **PFC BRADLEY MANNING** (SSN: [REDACTED]) that you observed and/or treated from 1 January 2011 to 10 August 2011 and to produce to the prosecution all mental health records of PFC Manning, including notes, from 1 January 2011 to 10 August 2011.

3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions and pass your contact information to the Defense Counsel so he may also ask his questions.

5. You will comply with this court order no later than **28 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Kenneth Deherrera

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
 2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during August 2009 and to produce all mental health records of PFC Manning, including notes, during August 2009.
 3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
 4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
 5. You will comply with this court order no later than **28 September 2012**.
 6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).
- So **ORDERED** this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)


COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Peter Resweber, Air Education Training Center (AETC)/Mental Health Flight (SGOW), Altus Air Force Base, OK

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated during June 2009 and to produce all mental health records of PFC Manning, including notes, during June 2009.
3. The records will be placed in a sealed envelope and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than 28 September 2012.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ORDERED this 11th day of September 2012 in chambers.


DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

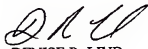
COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Joseph Gretsch

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of **PFC BRADLEY MANNING** (SSN: [REDACTED]) that you observed and/or treated during September 2009 and to produce all mental health records of PFC Manning, including notes, during September 2009.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **28 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.


DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211)

COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Edan Critchfield

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of **PFC BRADLEY MANNING** (SSN: [REDACTED]) that you observed and/or treated during May 2010 and to produce all mental health records of PFC Manning, including notes, during May 2010.

3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.

5. You will comply with this court order no later than **28 September 2012**.

6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

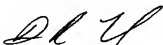
COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. Martin Leibman, US Army Medical Activity, Fort Lee, VA 23801

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of **PFC BRADLEY MANNING** (SSN: [REDACTED]) that you observed and/or treated during December 2009 and to produce all mental health records of PFC Manning, including notes, during December 2009.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **28 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

COURT ORDER:
Mental Health Professionals

DATE: 11 September
Suspense: 28 September 2012

TO: CPT Michael Worsley, Medical Detachment (Rear), 9700 Tank Trail Road, Joint Base Lewis-McChord, WA 98433

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of PFC BRADLEY MANNING (SSN: [REDACTED]) that you observed and/or treated from 30 December 2009 to 30 May 2010 and to produce all mental health records of PFC Manning, including notes, from 30 December 2009 to 30 May 2010.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **28 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

COURT ORDER:
Mental Health Records

DATE: 11 September 2012
Suspense: 14 September 2012

TO: LTC Rolanda Colbert, Commander, Joint Regional Correctional Facility, Fort Leavenworth, Kansas

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.

2. You are directed to produce all mental health records of PFC BRADLEY MANNING (SSN: [REDACTED]), including notes, from 30 June 2009 to 31 May 2011.

3. The records will be placed in a sealed envelope and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.

4. You will comply with this court order no later than 14 September 2012.

5. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So ORDERED this 11th day of September 2012 in chambers.



DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)


COURT ORDER:
Mental Health Professionals

DATE: 11 September 2012
Suspense: 28 September 2012

TO: Dr. David Hutcheson-Tipton

1. As the Military Judge presiding over the above-captioned General Court-Martial, I have determined, pursuant to Article 46, Uniform Code of Military Justice (10 U.S.C. § 846), that you have information which is required to provide in the above referenced case.
2. You are directed to respond to all questions asked by the prosecution in United States v. PFC Manning regarding the behavior, mental health, and suicidal ideations of **PFC BRADLEY MANNING** (SSN: [REDACTED]) that you observed and/or treated during June 2010 and to produce all mental health records of PFC Manning, including notes, during June 2010.
3. The records will be placed in a **sealed envelope** and provided to the Trial Counsel, MAJ Ashden Fein, Office of the Staff Judge Advocate, Military District of Washington, 103rd Avenue SW, Building 32, Suite 100, Fort Lesley J. McNair, DC, 20319-5058, (202) 685-1975, ashden.fein.mil@mail.mil.
4. Either call or email the Trial Counsel at the phone number or email address listed above to provide your contact information so the Trial Counsel may ask his questions.
5. You will comply with this court order no later than **28 September 2012**.
6. Should the requirements of this Court Order not be complied with, a Warrant of Attachment may be issued and executed to compel production of the records and you may be ordered to appear before the court to show cause as to why the court's order has not been carried out. Willful refusal to produce duly subpoenaed evidence for a court-martial may be prosecuted as a crime against the United States (Article 47, Uniform Code of Military Justice (10 U.S.C. § 847)).

So **ORDERED** this 11th day of September 2012 in chambers.


DENISE R. LIND
Colonel, U.S. Army
Chief Judge, 1st Judicial Circuit

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, [REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

)
)
) **DEFENSE SUPPLEMENT TO**
) **3 AUGUST 2012 MOTION FOR**
) **JUDICIAL NOTICE AND**
) **ADMISSION OF PUBLIC**
) **STATEMENTS**

) DATED: 13 SEPTEMBER 2012
)

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to Military Rule of Evidence (M.R.E.) 201 and M.R.E. 801(d)(2)(D) to take judicial notice of the statements cited in paragraph 5 of this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred to a general court-martial on 3 February 2012.

5. Over the past twenty-four months, agents of the Government have made several public statements regarding the information released by WikiLeaks. The agents for the Government

have made the following statements within the scope of their authority and during their employment by the Government:

a. GTMO Documents: “The Wikileaks releases include Detainee Assessment Briefs (DABs) written by the Department of Defense between 2002 and early 2009. These DABs were written based on a range of information available then. The Guantanamo Review Task Force, established in January 2009, considered the DABs during its review of detainee information. In some cases, the Task Force came to the same conclusions as the DABs. In other instances the Review Task Force came to different conclusions, based on updated or other available information. The assessments of the Guantanamo Review Task Force have not been compromised to Wikileaks. Thus, any given DAB illegally obtained and released by Wikileaks may or may not represent the current view of a given detainee.” *See Attachment A.*

b. SIGACTS: President Obama “the fact is these documents do not reveal any issues that have not already informed our public debate on Afghanistan.... Indeed, they point to the same challenges that led me to conduct an extensive review of our policy last fall.” *See Attachment B.*

Former Defense Secretary Robert Gates said in an August 16th 2010 letter to the head of the Senate Armed Services Committee that the leak had not revealed any “sensitive intelligence sources or methods.” The only real concern noted was the possibility that names of cooperative Afghan nationals may be placed at risk. *See Attachment C.*

c. Cables: Secretary Gates’ Statement: “Now, I’ve heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think – I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it’s in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments – some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation. So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another. Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.” *See Attachment D*

Secretary of State Hillary Rodham Clinton at an international security summit reiterated an earlier statement that the leaking of sensitive US diplomatic documents would not hinder Washington’s work with other countries. “I have certainly raised the issue of the leaks in order to assure our colleagues that it will not in any way interfere with American diplomacy or our commitment to continuing important work that is ongoing.” She was speaking at a press briefing at the summit of the 56- member Organization for Security and Cooperation in Europe (OSCE) in the Kazakh capital Astana, just days after the documents were released by the whistleblower website WikiLeaks. “I have not had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance ... going forward.” *See Attachment E*

Secretary Clinton has also been quoted on the record saying the leaks merely show, “diplomats doing the work of diplomacy.” She further noted, “In a way, it should be reassuring, despite the

occasional tidbit that is pulled out and unfortunately blown up. The work of diplomacy is on display, and you know, it was not our intention for it to be released this way -- usually it takes years before such matters are. But I think there's a lot to be said about what it shows about the foreign policy of the United States." See Attachment F

Vice-President Biden: "I don't think there's any damage. I don't think there's any substantive damage, no. Look, some of the cables that are coming out here and around the world are embarrassing." See Attachment G.

The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman of the Committee on the Judiciary, explained at a hearing before his Committee on 16 December 2010, "[w]e are too quick accept government claims that the risk national security and far too quick to forget the enormous value of some national security leaks." He went on to quote Secretary Gates, "I (Gates) have heard the impact of these releases on our foreign policy described as a meltdown, as a game changer, and so on. I think those descriptions are fairly significantly overwrought." See Attachment H.

WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referenced attachments to this motion in support of its request.

LEGAL AUTHORITY AND ARGUMENT

A. The statements are proper for judicial notice under M.R.E. 201

7. In the interest of judicial economy, M.R.E. 201 relieves a proponent from formally proving certain facts that reasonable persons would not dispute. There are two categories of adjudicative facts that may be noticed under the rule. First, the military judge may take judicial notice of adjudicative facts that are "generally known universally, locally, or in the area pertinent to the event." M.R.E. 201(b)(1). Under this category of adjudicative facts, it is not the military judge's knowledge or experience that is controlling. Instead, the test is whether the fact is generally known by those that would have a reason to know the adjudicative fact. *U.S. v. Brown*, 33 M.J. 706, 709 (N.M.C.A. 1992). The second category of adjudicative facts is those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." M.R.E. 201(b)(2). This category of adjudicative facts includes government records, business records, information in almanacs, scientific facts, and well documented reports. *Id.* See also, *U.S. v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987). Moreover, judicial notice may be taken of a periodical. *U.S. v. Needham*, 23 M.J. 383, 385 (C.M.A. 1983)(taking judicial notice of Drug Enforcement Agency publication).

8. In addition to judicial notice being appropriate for a periodical, it is appropriate for judicial notice to be taken of newspaper reports. *U.S. v. Cunningham*, 27 M.J. 899 (CGCMR

1989)(taking judicial notice of news reports regarding an Admiral's non-judicial punishment because the event was widely known throughout the Coast Guard), *see also*, *U.S. v. Floyd*, 2000 WL 35801774 (ACCA 2000)(taking judicial notice that news articles asserted a victim was harassed and murdered due to homosexuality). Moreover, it is appropriate to take judicial notice of Congressional proceedings. *U.S. v. Darby*, 312 U.S. 100 at 109 (1941). The key requirement for judicial notice under this category is that the source relied upon must be reliable.

9. Under M.R.E. 201(d), a military judge must take judicial notice if the proponent presents the necessary supporting information. In making the determination whether a fact is capable of being judicially noticed, the military judge is not bound by the rules of evidence. I STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A.SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* 201.02[3] (2003). Additionally, the information relied upon by the party requesting judicial notice need not be otherwise admissible. *Id.* The determination of whether a fact is capable of being judicially noticed is a preliminary question for the military judge. *See* M.R.E. 104(a).

10. The Defense requests this court take judicial notice that the statements outlined above were made by the attributed individuals. Here, the statements fall under the second category of facts contemplated by M.R.E. 201(b)(2). Each statement is capable of accurate and ready determination, as each appeared in an official press release or mainstream news publication. Indeed, many of the quotes are available in official releases and a quick web search for the substance of each quote results in reports from multiple media outlets. Moreover, the accuracy of the sources cannot be reasonably questioned. The statements were made by high-level government officials in their official capacities and were covered by a variety of respected journalistic outlets. Because the statements can be verified by reputable sources, they are the appropriate subject of judicial notice. M.R.E. 201(b)(2)

B. The statements are admissible as non-hearsay under M.R.E. 801(d)(2)

11. Any government agency affected by the alleged leaks should be considered a party opponent. *Id. U.S. v. American Tel. & Tel. Co.*, 498 F.Supp. 353 (D.C.D.C. 1980) is instructive. At issue were statements made by representatives of various agencies of the Executive Branch at FCC proceedings.¹ The court rejected the government argument that the entire Executive Branch should not be considered a party opponent, noting that the implications of the case extended beyond just the Department of Justice (DOJ). *Id.* at 357. The court also rejected the government's contention that it should not have to offer explanations for the statements because the government's size and the varying interests of the numerous government agencies would make offering such an explanation burdensome. The court held:

[T]he underlying theoretical premise of the government's argument is troubling and cannot be accepted. Its argument in effect is that, whenever the purpose of a rule-whether of pleading or of evidence-would be better effectuated by altering the configuration of a party to which it is applicable, then the definition of that

¹ Specifically at issue was a Brief for the Administrator of General Services, testimony of the Director for Telecommunications Policy, Office of the Secretary of Defense and Proposed Findings of Fact and Argument of the Secretary of Defense. *Id.* at 357.

party must be changed in midstream. Carried to its logical conclusion, this position would force the courts to change the shape and size of parties, particularly in complex litigation, depending upon the part of the case being tried and the principles of law and procedure that may be relevant at any given moment. These chameleon-like shifts in the identity of the parties would upset the orderly conduct of such litigation.

For these reasons, the Court rejects the proposition that the plaintiff in this case for the purposes of the rules of evidence is the Department of Justice; it holds, as it did on September 11, 1978, that the plaintiff is the United States; and it concludes that the statements contained in the three test case documents in question (see note 6 *supra*) constitute admissions by a party-opponent under Rule 801(d)(2). *Id.*

12. Like *American Tel. & Tel. Co.*, this case has far-reaching implications. Indeed, more than just the Departments of the Army and Defense have an interest in the instant case. A number of government agencies, including, but not limited to, the Department of State also had data compromised in the leaks with which PFC Manning is charged. Moreover, the Department of Justice has cooperated extensively in the investigation of the leaks. Further, as the number of damage assessments makes clear, a large number of agencies have reviewed the effect the leaks had on their agency. Presumably, these damage assessments were done because the agency was implicated in some way. Because more than just the Departments of the Army and Defense have been implicated by the leaks at issue in this case, those implicated agencies are also party opponents. *Id.*

13. The statements are admissible under M.R.E. 801(d)(2)(B). M.R.E. 801(d)(2)(B) establishes that "a statement of which the party has manifested the party's adoption or belief in its truth" qualifies as non-hearsay. While there is no military court on point and a split exists within the Federal courts, the Defense believes the line of cases following *U.S. v. Morgan*, 581 F.2d 933 (C.A. D.C. 1978). The *Morgan* court addressed the admissibility of an informant's statements by looking at the plain meaning of F.R.E. 801(d)(2)(B). The court admitted the informant's statements, noting "there is nothing in the history of the Rules generally or in the Rule 801(d)(2)(B) particularly to suggest it does not apply to the prosecution in criminal cases." *Id.* at 938. The court was particularly persuaded by the fact that the Government had manifested its belief in the informant's statements. *Id.* at 938.

14. The court in *U.S. v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988) also addressed this exception. There, the appellant was a member of the Church of Scientology and attempted to introduce statements the government had included in motions for the prosecution of members of the Church of Scientology in an unrelated matter. The court held that DOJ was most certainly a party opponent in a criminal case and the proffer of those statements to a Federal court was an adoption of their truth. Thus, the court held the statements by DOJ were admissible.

15. Here, like in *Kattar*, the parties have adopted the truth of their statements. While these statements were not made as part of a court filing, each statement for which judicial notice has been requested was made by a high ranking government official speaking in his/her official

capacity. Each statement was made on the record and within the scope of each speaker's government employment and it is fair to assume that the speaker was asserting the content of the statement as the truth. Indeed, any argument by trial counsel to the contrary would serve only to question a high-ranking government official's veracity for truthfulness. Because each speaker has manifested a belief in the truth of his/her statement the statements fall squarely within the non-hearsay contemplated by M.R.E. 801(d)(2)(B). *See also, U.S. v. Johnson*, --- F.Supp.2d ---, 2012 WL 1836282 (N.D. Iowa 2012)(discussing the admissibility of inconsistent factual assertions and inconsistent opinions).

16. The statements are also admissible pursuant to M.R.E. 801(d)(2)(D). Statements by a party's agent or servant are admissible against that party as long as those statements fall within the agent's or servant's scope of authority and are made while the agency or employment relationship continued. M.R.E. 801(d)(2)(D). Statements made in the scope of employment by a government employee may properly be admitted. *C&H Commercial Contractors v. U.S.*, 35 Fed. Cl. 246, 256 (Fed. Cl. 1996), *see also, DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI AND EDWARD J. IMWINKELRIED, MILITARY EVIDENTIARY FOUNDATIONS*, 10-11(3)(A) at p.421 (Matthew Bender & Co. 2010). The court in *U.S. v. Babat*, 18 M.J. 316 (C.M.A. 1984) held, "statements someone makes through an authorized agent are imputable to the principle and may be admitted in evidence against him." *Id.* at 324. The rationale for this rule is that agents or employees have an incentive not to make statements that might damage the party who retains them.

17. While some circuit courts have held that not all statements by government agents should be considered statements by a party opponent under rule 801(d)(2)(D), such holdings are predicated on the idea that an individual cannot bind the sovereign. *U.S. v. Garza*, 448 F.3d 294 (5th Cir. 2006). However, where a government agent is capable of binding the sovereign, statements from that agent are admissible under 801(d)(2)(D). *U.S. v. Salerno*, 937 F.2d 797, 811-812 (2d. Cir. 1991)(holding that opening and closing statements made by prosecutor in a different, but related criminal prosecution were admissible to show the government once had expressed a different theory about the alleged crime), *see also, U.S. v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989)(holding that a government manual on field sobriety testing issued by the government was admissible where the agency was a relevant and competent section of the government), *U.S. v. Branham*, 97 F.3d 835, 851 (6th Cir. 1996)(noting that the federal government is a party-opponent of the defendant in a criminal case and a statements by a paid informant were admissible).

18. Here, each of the statements for which judicial notice is requested was made by an individual with the power to bind the sovereign. The statements in questions are not the musings of random Soldiers posted to a blog nor are they statements from low-level government bureaucrats. Rather, each individual serves as a high-level government official; serving as President or Vice-President, heading a government agency with the ability to bind the government through policy-making decisions, or, as part of his employment, speaking on behalf of those who did/do have the ability to bind the sovereign. Moreover, these individuals head agencies relevant to this case because each agency was directly affected by the alleged leaks. No doubt, the Government has made common practice of calling the instant agencies "equity holders." Because the statements were made by party opponents within the scope of their

employment and the party opponents have the ability to bind the sovereign their statements should be deemed admissible under M.R.E. 801(d)(2)(D).

C. Statements appearing in newspaper articles are admissible under M.R.E. 803(6) and 807

19. The proffered statements, as printed in various new outlets, are admissible under the M.R.E. 803(6) business records exception. The plain reading of M.R.E. 803(6) supports this position. It states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11) or any other statute permitting certification in a criminal proceeding in a court of the United States.

20. Here, the proffered news reports comport with the requirements of M.R.E. 803(6). The news reports are in the form of a published article and were made at or near the time of the reported events. The authors of the articles have personal knowledge of the statements because they conducted an interview, were present for the uttering of the statements or reported on an official press release. Moreover, government Branches and Departments and news agencies make and keep such briefings, releases and news reports in the course of their regularly conducted business activities.² Finally, the authenticity of the reports is not at issue because M.R.E. 902(6) allows for self-authentication of "printed material purporting to be newspapers or periodicals." Because the mandates of M.R.E. 803(6) are satisfied, the news reports at issue are admissible under the business records exception to the hearsay rule.

21. This position is supported by the 6th Circuit's opinion in *U.S. v. Reese*, 568 F.2d 1246 (C.A. Mich 1977). There, the court considered a scrapbook of newspaper clippings maintained by hospital staff and found the scrapbook admissible under the business records exception. The court appeared dismissive of concerns that the contents of the newspaper article were hearsay, holding, "[t]he fact that the item in the newspaper was factually written by a newspaper employee and not an employee of the hospital is not determinative of the exhibit's admissibility since the rule specifically provides that the 'memorandum, report, record, or data compilation, in any form' could be made 'from information transmitted by, a person with knowledge.' In this instance, the hospital itself would qualify as a "person with knowledge." *Id.* at 1152. Again, the authors of the offered news reports have the requisite knowledge and qualify as a person with knowledge for the purposes of M.R.E. 803(6). *Id.* As such, any hearsay hurdle presented by the news reports are cleared with M.R.E. 803(6).

² Indeed, a number of the statements are included in official press releases available on the websites of the White House, Congress, Department of Defense and Department of State.

22. Likewise, the proffered statements, as printed in various news outlets, are admissible under the plain reading of the residual hearsay exception found in M.R.E. 807. The rule states:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

23. Here, each of the three prongs required by M.R.E. 807 is satisfied. First, the news reports are offered as evidence of a material fact. During the pre-sentencing phase of trial, if necessary, PFC Manning is permitted to offer matters in extenuation and mitigation. R.C.M. 1001(c)(1)(B). Here, the statements in question are offered to show that high-level Government officials made statements indicating there was minimal damage by the alleged leaks. Because evidence that the alleged leaks caused minimal damage would tend to lessen PFC Manning's punishment it is evidence of a material fact. Second, the statements offered are more probative on the point of damage than those that could otherwise be procured through reasonable effort. While the Defense could certainly contact members of the Executive and Legislative branches and Departments of State and Defense, such statements would not carry nearly the same weight as the offered statements from the individuals quoted. Indeed, statements from the President, Vice-President and Secretaries of Defense and State are far more probative than any other government employees. Third, justice will best be served by admission of the requested statements. The issue of damage caused by the alleged leaks will be of the utmost importance during any pre-sentencing phase of PFC Manning's trial. Allowing PFC Manning to offer the instant statements strikes an important balance between presenting the best possible extenuation and mitigation case and judicial economy. Because newspaper articles qualify as self-authenticating documents pursuant to M.R.E. 902(6), their reliability should not be reasonably questioned. Taking judicial notice of the news reports fosters judicial economy by reducing the amount of witnesses and testimony that is required in the pre-sentencing phase. As such, the interests of justice are served by a finding that the news reports are admissible under the residual hearsay exception. M.R.E. 807.

24. Admission of newspaper articles under the residual hearsay exception is not without precedent. *Dallas County v. Commercial Union Assurance Company*, 286 F.2d 388 (C.A. 5th Cir.1961) is instructive. There, the court turned to a residual hearsay exception-type analysis when it considered the admissibility of a news article from 1901 offered to show that a clock tower had caught fire in the past.³ The court ultimately admitted the document. Pointing to the difficulty in obtaining live testimony on the matter and the natural trustworthiness of the news report, it held, "It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds." *Id.* at 396-398. Here, as discussed above, the news reports are relevant and material. Moreover, the reports are necessary and trustworthy. Like the author of the news

³ It is worth noting that the trial judge admitted the article as a record of the newspaper that originally published the article, though there is no discussion of this theory in the opinion. *Id.* at 391.

report in *Dallas County*, there was no incentive for the authors of the proffered reports to fabricate quotes for high ranking Government officials. Moreover, the fact that each quote was reported by multiple news outlets further bolsters their trustworthiness. Because the offered news reports are necessary, trustworthy, relevant and promote judicial economy⁴ it is appropriate to admit them under M.R.E. 807. *Id.*

D. Official press releases and reports Congressional hearings are admissible under M.R.E. 803(8)

25. The statements included in official press releases and from Representative John Conyers, Jr. are admissible because they were made as part of an official release or a Congressional hearing and are a matter of public record. M.R.E. 803(8) establishes:

Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there as a duty of report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Statements by the President, Secretaries of Defense and State and a Congressman made at a formal committee hearing clearly fall within this exception. *Byrd v. ABC Professional Tree Service, Inc.*, 832 F.Supp.2d 917 (M.D.Tenn 2011)(holding Department of Labor press release fell within hearsay 803(8) exception), *see also*, *Zeigler v. Fisher-Price, Inc.*, 302 F.Supp.2d 999, 1021, n10 (N.D.Iowa 2004) (“To the extent the press release can be construed as stating conclusions or opinions of the [Consumer Products Safety Commission], it also was admissible”). These statements were made at official functions and in the official capacities of the speakers.⁵ Clearly, a report or statement, posted on an official government website⁶, has inherent guarantees of trustworthiness and qualifies as an activity of the public office. As such, the proffered report is admissible. M.R.E. 803(8).

E. The proffered statements are admissible when not offered for the truth of the matter asserted

26. Should this Court decline to follow one of the theories of admissibility advanced above, the proffered statements are admissible when not offered for the truth of the matter asserted. Indeed, the reports and the quotes within them would remain relevant not to show that the alleged leaks

⁵ Congressman Conyers made his statements at a judiciary committee discussion on the “Espionage Act and the legal and constitutional issues raised by Wikileaks.”

⁶ For example, <https://www.defense.gov/Releases/Release.aspx?ReleaseID=14439>, <http://www.whitehouse.gov/the-press-office/remarks-president-after-bipartisan-leadership-meeting>, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728>, <http://www.state.gov/secretary/rm/2010/12/152212.htm>, and http://judiciary.house.gov/hearings/hear_101216.html

did not actually cause harm, but rather to demonstrate that Government officials asserted the United States' position as such. Whether the alleged leaks *actually* caused harm would not be offered under this scenario. The articles and reports would show that the Government's official position was that the leaks caused no harm, not whether the alleged leaks *actually did*. Because the reports and statements would still be relevant and would not be offered for the truth of the matter asserted they would be admissible.

F. All the proffered statements would be admissible under R.C.M. 1001(c)(3)

27. In the event that PFC Manning's trial enters the pre-sentencing phase and in the event the rules of evidence are relaxed, each of the statements for which judicial notice has been requested will be admissible. R.C.M. 1001(c)(3) provides that the "military judge may, with respect to matters in extenuation and mitigation or both, relax the rules of evidence." Such a relaxation is contingent on the reliability of the documents being admitted. Here, should the Defense request invocation of R.C.M. 1001(c)(3), each of the proffered documents would be admissible.


28. First, each document is related to extenuation and mitigation. The statements in question are from the President, Vice-President, Secretary of State, former Secretary of Defense and a U.S. Congressman, respectively. Each statement relates to the damage, or lack thereof, of the leaks for which PFC Manning has been accused. An absence of harm caused by the leaks may tend to reduce punishment and is, thus, relevant as extenuation and mitigation evidence.

29. Second, each statement is reliable.⁷ The statements either appeared in an official release, be it a press release or Congressional report, or were widely reported by reputable news outlets. As noted earlier, there is scant likelihood that the authors of the news reports fabricated the quotes in question. Moreover, as discussed, newspaper articles are self-authenticating. M.R.E. 902(6). Because the statements offered are offered in extenuation and mitigation and are inherently reliable, they would be admissible under relaxed rules of evidence in a pre-sentencing phase of trial.

CONCLUSION

30. Based on the above, the Defense requests that the Court to take judicial notice of requested adjudicate facts, and to admit these facts as admissions by a party opponent at trial.

Respectfully Submitted



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

⁷ It should be noted that at no point has the Government contended that the proffered statements were never uttered.

ATTACHMENT A



U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Release

On the Web:

<http://www.defense.gov/Releases/Release.aspx?ReleaseID=14439>

Media contact +1 (703) 697-5131/697-5132

Public contact:

<http://www.defense.gov/landings/comment.aspx>

or +1 (703) 571-3343

IMMEDIATE RELEASE

No. 340-11
April 24, 2011

Statement by Pentagon Press Secretary Geoff Morrell and Special Envoy for Closure of the Guantanamo Detention Facility Ambassador Daniel Fried

"It is unfortunate that several news organizations have made the decision to publish numerous documents obtained illegally by Wikileaks concerning the Guantanamo (GTMO) detention facility. These documents contain classified information about current and former GTMO detainees, and we strongly condemn the leaking of this sensitive information.

"The Wikileaks releases include Detainee Assessment Briefs (DABs) written by the Department of Defense between 2002 and early 2009. These DABs were written based on a range of information available then.

"The Guantanamo Review Task Force, established in January 2009, considered the DABs during its review of detainee information. In some cases, the task force came to the same conclusions as the DABs. In other instances the review task force came to different conclusions, based on updated or other available information. The assessments of the Guantanamo Review Task Force have not been compromised to Wikileaks. Thus, any given DAB illegally obtained and released by Wikileaks may or may not represent the current view of a given detainee.

"Both the previous and the current administrations have made every effort to act with the utmost care and diligence in transferring detainees from Guantanamo. The previous administration transferred 537 detainees; to date, the current administration has transferred 87. Both administrations have made the protection of American citizens the top priority and we are concerned that the disclosure of these documents could be damaging to those efforts. That said, we will continue to work with allies and partners around the world to mitigate threats to the United States and other countries and to work toward the ultimate closure of the Guantanamo detention facility, consistent with good security practices and our values as a nation."

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April 24, 2011

A Statement by the United States Government

"It is unfortunate that The New York Times and other news organizations have made the decision to publish numerous documents obtained illegally by Wikileaks concerning the Guantanamo detention facility. These documents contain classified information about current and former GTMO detainees, and we strongly condemn the leaking of this sensitive information.

"The Wikileaks releases include Detainee Assessment Briefs (DABs) written by the Department of Defense between 2002 and early 2009. These DABs were written based on a range of information available then.

"The Guantanamo Review Task Force, established in January 2009, considered the DABs during its review of detainee information. In some cases, the Task Force came to the same conclusions as the DABs. In other instances the Review Task Force came to different conclusions, based on updated or other available information. The assessments of the Guantanamo Review Task Force have not been compromised to Wikileaks. Thus, any given DAB illegally obtained and released by Wikileaks may or may not represent the current view of a given detainee.

"Both the previous and the current Administrations have made every effort to act with the utmost care and diligence in transferring detainees from Guantanamo. The previous Administration transferred 537 detainees; to date, the current Administration has transferred 67. Both Administrations have made the protection of American citizens the top priority and we are concerned that the disclosure of these documents could be damaging to those efforts. That said, we will continue to work with allies and partners around the world to mitigate threats to the U.S. and other countries and to work toward the ultimate closure of the Guantanamo detention facility, consistent with good security practices and our values as a nation."

Geoff Morrell

Pentagon Press Secretary

Ambassador Dan Fried

Special Envoy for Closure of the Guantanamo Detention Facility

ATTACHMENT B

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The White House
Office of the Press Secretary

For Immediate Release

July 27, 2012

Remarks by the President After Bipartisan Leadership Meeting

Rose Garden

12:30 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. I just concluded a productive discussion with the leaders of both parties in Congress.

This was one of a series of regular meetings that I called for in the State of the Union because I think it's important for us to come together and speak frankly about the challenges we face and to work through areas where we don't agree, hopefully find some areas where we do.

Our conversation today focused on an issue that's being discussed every day at kitchen tables across this country -- and that's how do we create jobs that people need to support their families.

I believe that starts with doing everything we can to support small businesses. These are the stores, the restaurants, the start-ups and other companies that create two out of every three new jobs in this country -- and that grow into the big businesses that transform industries, here in America and around the world.

But we know that many of these businesses still can't get the loans and the capital they need to keep their doors open and hire new workers.

That's why we've proposed steps to get them that help -- eliminating capital gains taxes on investments, making it easier for small lenders to support small businesses, expanding successful SBA programs to help these businesses access the capital that they need.

This is how we create jobs -- by investing in the innovators and entrepreneurs that have always driven our prosperity.

These are the kind of common-sense steps that folks from both parties have supported in the past -- steps to cut taxes and spur private sector growth and investment. And I hope that in the coming days, we'll once again find common ground and get this legislation passed. We shouldn't let America's small businesses be held hostage to partisan politics -- and certainly not at this critical time.

We also talked about the need to move forward on energy reform. The Senate is now poised to act before the August recess, advancing legislation to respond to the BP oil spill and create new clean energy jobs.

That legislation is an important step in the right direction. But I want to emphasize it's only the first step. And I intend to keep pushing for broader reform, including climate legislation, because if we've learned anything from the tragedy in the Gulf, it's that our current energy policy is unsustainable.

And we can't afford to stand by as our dependence on foreign oil deepens, as we keep on pumping out the deadly pollutants that threaten our air and our water and the lives and livelihoods of our people. And we can't stand by as we let China race ahead to create the clean energy jobs and industries of the future. We should be developing those renewable energy sources, and creating those high-wage, high-skill jobs right here in the United States of America.

That's what comprehensive energy and climate reform would do. And that's why I intend to keep pushing this issue forward.

I also urged the House leaders to pass the necessary funding to support our efforts in Afghanistan and Pakistan. I know much has been written about this in recent days as a result of the substantial leak of documents from Afghanistan covering a period from 2004 to 2009.

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WATCH THE VIDEO



July 27, 2012 2:22 PM
President Obama on Bipartisan Leadership Meeting

EXTENDING MIDDLE-CLASS TAX CUTS IT'S THE RIGHT THING TO DO



VIEW THE INFOGRAPHIC

BLOG POSTS ON THIS ISSUE

September 12, 2012 11:54 AM EDT

President Obama Discusses the Attack in Benghazi, Libya



President Obama condemns the attacks on an American diplomatic post in Benghazi, Libya and praises the service of those who lost their lives.

September 12, 2012 12:34 PM EDT

Annual Census Data on Income, Poverty, and Health Insurance for 2011
The Annual Census data report shows that we have made progress digging our way out of the worst economic crisis since the Great Depression, but families are still struggling. Congress must act on the policies President Obama has put forward to strengthen the middle class and those trying to get into it.

September 12, 2012 12:18 PM EDT

The Health Care Law is Saving Americans Money

According to a new report, consumers saved more \$2 billion in the past year, thanks to new rules that protect people from insurance industry abuses.

While I'm concerned about the disclosure of sensitive information from the battlefield that could potentially jeopardize individuals or operations, the fact is these documents don't reveal any issues that haven't already informed our public debate on Afghanistan. Indeed, they point to the same challenges that led me to conduct an extensive review of our policy last fall.

So let me underscore what I've said many times: For seven years, we failed to implement a strategy adequate to the challenge in this region, the region from which the 9/11 attacks were waged and other attacks against the United States and our friends and allies have been planned.

That's why we've substantially increased our commitment there, insisted upon greater accountability from our partners in Afghanistan and Pakistan, developed a new strategy that can work, and put in place a team, including one of our finest generals, to execute that plan. Now we have to see that strategy through.

And as I told the leaders, I hope the House will act today to join the Senate, which voted unanimously in favor of this funding, to ensure that our troops have the resources they need and that we're able to do what's necessary for our national security.

Finally, during our meeting today, I urged Senator McConnell and others in the Senate to work with us to fill the vacancies that continue to plague our judiciary. Right now, we've got nominees who've been waiting up to eight months to be confirmed as judges. Most of these folks were voted out of committee unanimously, or nearly unanimously, by both Democrats and Republicans. Both Democrats and Republicans agreed that they were qualified to serve. Nevertheless, some in the minority have used parliamentary procedures time and again to deny them a vote in the full Senate.

If we want our judicial system to work – if we want to deliver justice in our courts – then we need judges on our benches. And I hope that in the coming months, we'll be able to work together to ensure a smoother process in the Senate.

Now, we don't have many days left before Congress is out for the year. And everyone understands that we're less than 100 days from an election. It's during this time that the noise and the chatter about who's up in the polls and which party is ahead threatens to drown out just about everything else.

But the folks we serve – who sent us here to serve, they sent us here for a reason. They sent us here to listen to their voices. They sent us here to represent their interests – not our own. They sent us here to lead. And I hope that in the coming months, we'll do everything in our power to live up to that responsibility. Thanks very much.

END 12:37 P.M. EDT

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Obama: 'Nothing new' in Wikileaks Afghan records leak

27 July 10 14:09 ET



Barack Obama has said that the leaking of classified documents on the war in Afghanistan is a concern, but that it had not revealed any new information.

In his first public reaction to the leak, the US president said the data justified his decision to overhaul the US military strategy in Afghanistan.

Wikileaks, which posted the documents on its website, describes them as battlefield and intelligence reports.

New details, including reports on Osama Bin Laden have emerged from the files.

Several files track Bin Laden, although the US has said it had received no reliable information on him "in years".

"While I am concerned about the disclosure of sensitive information from the battlefield that could potentially jeopardise individuals or operations, the fact is these documents do not reveal any issues that have not already informed our public debate on Afghanistan," Mr Obama said at a press conference in Washington.

"Indeed they point to the same challenges that led me to conduct an extensive review of our policy last fall."

"For seven years, we failed to implement a strategy adequate to the challenge in this region," he added, pointing out that it was from Afghanistan that the 11 September attacks on New York and Washington and other terror plots originated.

"That's why we have substantially increased our commitment there, insisted upon greater accountability from Afghanistan and Pakistan, developed a new strategy that can work. Now we have to see that strategy through."

Hunt for whistle blower

The Pentagon has launched what a spokesman described as "a very robust investigation" into who passed the classified documents to Wikileaks.

The Army Criminal Investigation Division has also launched its own inquiry into the breach.

Wikileaks says the documents were compiled by a variety of military units between 2004 and 2009, the majority of them written by soldiers and intelligence officers listening to reports radioed in by troops on front line deployments.

In August 2006, a US intelligence report placed Bin Laden at a meeting in Quetta, over the border in Pakistan.

It said he and others - including the Taliban leader, Mullah Omar - were organising suicide attacks in Afghanistan.

The targets were unknown, the report said, but the bombers were carrying explosives from Pakistan.

Nearly 200 files concern Task Force 373, a US special forces unit whose job was to kill or capture Taliban or al-Qaeda commanders.

The records log 144 incidents involving Afghan civilian casualties, including 195 fatalities, the UK's Guardian newspaper reports.

The Wikileaks dossier includes an incident in June 2007 when the unit engaged in a firefight with what were believed to be insurgents. An airstrike was called in.

Seven of those killed were Afghan police officers. A further four were injured. The incident was labelled a misunderstanding.

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The President reminded reporters in the Rose Garden that that policy review led to a substantial increase in troops and a strategy that he believes can lead to victory.

WORLD NEWS WITH DIANE SAWYER
(<http://abcnews.go.com/US/07/07/obama-on-wikileaks/>)
NEWS WITH DIANE SAWYER

"Now we have to see that strategy through. And as I told the leaders, I hope the House will act today to join the Senate, which voted unanimously in favor of this funding, to ensure that our troops have the resources they need and that we're able to do what's necessary for our national security," the President said.

The House is expected to vote today on a war funding bill for the conflicts in Afghanistan and Iraq.

The President spoke after one of a series of regularly scheduled meetings with Congressional leaders from both parties - including House Speaker Nancy Pelosi, Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, House Minority Leader John Boehner, and House Majority Leader Steny Hoyer.

In addition to the war funding bill, the President said also urged both parties to pass the small business aid bill. The President heads to Edison, NJ tomorrow, where he will hold a roundtable discussion with local business owners, as part of a larger series of trips focused on the economy.

Mr. Obama pledged to keep pushing for broader energy reform including a climate change regulation component, despite last week's setbacks on the Hill with Senate Democrats abandoning climate change legislation.

"The Senate is now poised to act before the August recess, advancing legislation to respond to the BP oil spill and create new clean-energy jobs. That legislation is an important step in the right direction, but I want to emphasize it's only the first step. And I intend to keep pushing for broader reform, including climate legislation."

The President said he also urged Senate Minority Leader Mitch McConnell to allow judicial nominees to be confirmed. Mr. Obama expressed his frustration over a number of nominees who have been voted out of committee, but have not been allowed to begin service because they have yet to have a full vote in the Senate. The President accused "some in the minority" of using "parliamentary procedures time and again" to hold up these nominations.

33 1m |

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ATTACHMENT C

JOHN MACKEY, ARIZONA
WALTER W. MOORE, OKLAHOMA
JEFF SESSIONS, ALABAMA
KARBY CHAMBLISS, GEORGIA
LUSHER G. GRAHAM, SOUTH CAROLINA
JOHN TAYLOR, SOUTH DAKOTA
ROGER F. WICKER, MISSISSIPPI
GEORGE G. HENRIEX, FLORIDA
SCOTT R. BROWN, MASSACHUSETTS
RICHARD BURN, NORTH CAROLINA
DAVID VITLER, LOUISIANA
SANDRA COLLIER, MISSOURI

WASHINGTON, DC 20510-6050

1. What is the Department's assessment of the extent to which the documents disclosed on Sunday contain information that was not previously available in the public domain? In the Department's judgment, what are the most significant new disclosures resulting from the release of these documents?
2. What is the Department's assessment of the extent to which sources and methods were divulged as a result of the release of these documents?
3. Has the Department conducted a damage assessment to determine the extent to which individuals may have been put at risk, the enemy may have learned about our tactics and techniques, our allies may be less cooperative in the future, or we may have suffered other specific damage as a result of the release of these documents? If so, what are the conclusions of that assessment?

4. What steps is the Department taking to identify the individual or individuals who released these documents and to prevent future leaks of this kind?

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Levin". The signature is fluid and cursive, with the first name "Carl" and last name "Levin" clearly distinguishable.

Carl Levin
Chairman



1570

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

1570
AUG 16 2010
12:11 PM '10

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your July 28, 2010, letter regarding the unauthorized disclosure and publication of classified military documents by the WikiLeaks organization. I share your concerns about the potential compromise of classified information and its effect on the safety of our troops, allies, and Afghan partners.

After consulting with the Director of the Federal Bureau of Investigation, I have directed a thorough investigation to determine the scope of any unauthorized release of classified information and identify the person or persons responsible. I have also established an interagency Information Review Task Force, led by the Defense Intelligence Agency, to assess the content of any compromised information and the impacts of such a compromise. Our initial review indicates most of the information contained in these documents relates to tactical military operations. The initial assessment in no way discounts the risk to national security; however, the review to date has not revealed any sensitive intelligence sources and methods compromised by this disclosure.

The documents do contain the names of cooperative Afghan nationals and the Department takes very seriously the Taliban threats recently discussed in the press. We assess this risk as likely to cause significant harm or damage to the national security interests of the United States and are examining mitigation options. We are working closely with our allies to determine what risks our mission partners may face as a result of the disclosure. There is a possibility that additional military documents may be published by WikiLeaks and the Department is developing courses of action to address this possibility.

The scope of the assessment and nature of the investigative process require a great deal of time and effort. I am committed to investigating this matter and determining

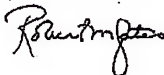
31 JUL 2010 10:11 PM



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SENATE ARMED SERVICES

appropriate action to reduce the risk of any such compromises in the future. We will keep you informed as additional information becomes available.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert M. Gates". The signature is fluid and cursive, with the first name "Robert" being more prominent and the last name "Gates" written in a more compact, stylized manner.

cc:
The Honorable John McCain
Ranking Member

ATTACHMENT D



U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Transcript

On the Web:
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Presenter: Secretary of Defense Robert M. Gates and Chairman, Joint Chiefs of Staff Adm. Mike Mullen

November 30
2010

DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon

SEC. GATES: Good afternoon.

This past February, I established a high-level working group to review the issues associated with implementing a repeal of the "don't ask, don't tell" law regarding homosexual men and women serving in the military, and based on those findings to develop recommendations for implementation should the law change. The working group has completed their work, and today the department is releasing their report to the Congress and to the American public.

Admiral Mullen and I will briefly comment on the review's findings and our recommendations for the way ahead.

We will take some questions. And then the working group's co-chairs, General Counsel Jeh Johnson and Army General Carter Ham, will provide more detail on the report, and answer any questions you might have on methodology, data and recommendations.

When I first appointed Mr. Johnson and General Ham to assume this duty, I did so with the confidence that they would undertake this task with the thoroughness, the seriousness, professionalism and objectivity befitting a task of this magnitude and consequence. I believe that a close and serious reading of this report will demonstrate they've done just that. We are grateful for the service they have rendered in taking on such a complex and controversial subject.

The findings of their report reflect nearly 10 months of research and analysis along several lines of study, and represent the most thorough and objective review ever of this difficult policy issue and its impact on the American military.

First, the group reached out to the force to better understand their views and attitudes about a potential repeal of the "don't ask, don't tell" law. As was made clear at the time and is worth repeating today, this outreach was not a matter of taking a poll of the military to determine whether the law should be changed. The very idea of asking the force to in effect vote on such a matter is antithetical to our system of government, and would have been without precedent in the long history of our civilian-led military.

The president of the United States, the commander in chief of the armed forces, made his position on this matter clear, a position I support. Our job as the civilian and military leadership of the Department of Defense was to determine how best to prepare for such a change should the Congress change the law.

Nonetheless, I thought it critically important to engage our troops and their families on this issue, as ultimately it will be they who will determine whether or not such a transition is successful. I believe that we had to learn the attitudes, obstacles and concerns that would need to be addressed should the law be changed. We could do this only by reaching out and listening to our men and women in uniform and their families.

The working group undertook this through a variety of means, from a mass survey answered by tens of thousands of troops and their spouses to meetings with small groups and individuals, including hearing from those discharged under the current law.

Mr. Johnson and General Ham will provide more detail on the results of the survey of troops and their families.

But in summary, a strong majority of those who answered the survey -- more than two-thirds -- do not object to gays and lesbians serving openly in uniform. The findings suggest that for large segments of the military, repeal of "don't ask, don't tell," though potentially disruptive in the short term, would not be the wrenching, traumatic change that many have feared and predicted.

The data also shows that within the combat arms specialties and units, there is a higher level of discontent, of discomfort and resistance to changing the current policy. Those findings and the potential implications for America's fighting forces remain a source of concern to the service chiefs and to me. I'll discuss this later.

Second, the working group also examined thoroughly all the potential changes to the department's regulations and policies dealing with matters such as benefits, housing, relationships within the ranks, separations and discharges. As the co-chairs will explain in a few minutes, the majority of concerns often raised in association with the repeal -- dealing with sexual conduct, fraternization, billeting arrangements, marital or survivor benefits -- could be governed by existing laws and regulations.

Existing policies can and should be applied equally to homosexuals as well as heterosexuals. While a repeal would require some changes to regulations, the key to success, as with most things military, is training, education, and, above all, strong and principled leadership up and down the chain of command.

Third, the working group examined the potential impact of a change in the law on military readiness, including the impact on unit cohesion, recruiting and retention, and other issues critical to the performance of the force. In my view, getting this category right is the most important thing we must do.

The U.S. armed forces are in the middle of two major military overseas campaigns -- a complex and difficult drawdown in Iraq, a war in Afghanistan -- both of which are putting extraordinary stress on those serving on the ground and their families. It is the well-being of these brave young Americans, those doing the fighting and the dying since 9/11, that has guided every decision I have made in the Pentagon since taking this post nearly four years ago. It will be no different on this issue. I am determined to see that if the law is repealed, the changes are implemented in such a way as to minimize any negative impact on the morale, cohesion and effectiveness of combat units that are deployed, about to deploy to the front lines.

With regards to readiness, the working group report concluded that overall and with thorough preparation -- and I emphasize thorough preparation -- there is a low risk from repealing "don't ask, don't tell." However, as I mentioned earlier, the survey data showed that a higher proportion -- between 40 (percent) and 60 percent -- of those troops serving in predominately all-male combat specialties -- mostly Army and Marines, but including the Special Operations formations of the Navy and the Air Force -- predicted a negative effect on unit cohesion from repealing the current law.

For this reason, the uniform service chiefs are less sanguine about the working -- than the working group about the level of risk of repeal with regard to combat readiness.

The views of the chiefs were sought out and taken seriously by me and by the authors of this report. The chiefs will also have the opportunity to explain their -- to provide their expert military advice to the Congress, as they have to me and to the president. Their perspective deserves serious attention and consideration, as it reflects the judgment of decades of experience and the sentiment of many senior officers.

In my view, the concerns of combat troops as expressed in the survey do not present an insurmountable barrier to successful repeal of "don't ask, don't tell." This can be done and should be done without posing a serious risk to military readiness. However, these findings do lead me to conclude that an abundance of care and preparation is required if we are to avoid a disruptive and potentially dangerous impact on the performance of those serving at the tip of the spear in America's wars.

This brings me to my recommendations on the way ahead. Earlier this year, the House of Representatives passed legislation that would repeal "don't ask, don't tell" after a number of steps take place, the last being certification by the president, the secretary of Defense and the chairman that the new policies and regulations were consistent with the U.S. military's standards of readiness, effectiveness, unit cohesion, and recruiting and retention.

Now that we have completed this review, I strongly urge the Senate to pass this legislation and send it to the president for signature before the end of this year.

I believe this is a matter of some urgency because, as we have seen in the past year, the federal courts are increasingly becoming involved in this issue. Just a few weeks ago, one lower court ruling forced the department into an abrupt series of changes that were no doubt confusing and distracting to men and women in the ranks. It is only a matter of

time before the federal courts are drawn once more into the fray, with the very real possibility that this change would be imposed immediately by judicial fiat -- by far the most disruptive and damaging scenario I can imagine, and one of the most hazardous to military morale, readiness and battlefield performance.

Therefore, it is important that this change come via legislative means; that is, legislation informed by the review just completed. What is needed is a process that allows for a well-prepared and well-considered implementation -- above all, a process that carries the imprimatur of the elected representatives of the people of the United States.

Given the present circumstances, those that choose not to act legislatively are rolling the dice that this policy will not be abruptly overturned by the courts. The legislation presently before the Congress would authorize a repeal of the "don't ask, don't tell" pending a certification by the president, secretary of Defense and the chairman. It would not harm military readiness.

Nonetheless, I believe that it would be unwise to push ahead with full implementation of repeal before more can be done to prepare the force -- in particular, those ground combat specialties and units -- for what could be a disruptive and disorienting change.

The working group's plan, with a strong emphasis on education, training and leader development, provides a solid road map for a successful full implementation of repeal, assuming that the military is given sufficient time and preparation to get the job done right.

The department has already made a number of changes to regulations that within existing law applied more exacting standards to procedures, investigating or separating troops for suspected homosexual conduct -- changes that have added a measure of common sense and decency to a legally and morally fraught process.

I would close on a personal note and a personal appeal. This is the second time that I have dealt with this issue as a leader in public life, the prior case being in CIA in 1992 when I directed that openly gay applicants be treated like all other applicants; that is, whether as individuals they met our competitive standards. That was and is a situation significantly different in circumstance and consequence than confronting -- than that confronting the United States armed forces today.

Views toward gay and lesbian Americans have changed considerably during this period, and have grown more accepting since "don't ask, don't tell" was first enacted. But feelings on this matter can still run deep and divide often starkly along demographic, cultural and generational lines, not only in society as a whole but in the uniformed ranks as well.

For this reason, I would ask, as Congress takes on this debate, for all involved to resist the urge to lure our troops and their families into the politics of this issue. What is called for is a careful and considered approach, an approach that to the extent possible welcomes all who are qualified and capable of serving their country in uniform, but one that does not undermine out of haste or dogmatism those attributes that make the U.S. military the finest fighting force in the world.

The stakes are too high for a nation under threat, for a military at war, to do any less.

Admiral?

ADM. MULLEN: Thank you, Mr. Secretary.

I, too, wish to thank Jeh Johnson and Carter Ham, as well as everyone involved in the working group, for their extraordinary efforts over much of the past year. I fully endorse their report, its findings and the implementation plan recommended by the working group.

The working group was given a tall order -- indeed, nothing less than producing the first truly comprehensive assessment of not only the impact of repeal of the law governing "don't ask, don't tell," but also about how best to implement a new policy across the joint force. As the secretary indicated, the working group surveyed our troops and their spouses, consulted proponents and opponents of repeal, and examined military experience around the world. They also spoke with serving gays and lesbians, as well as former members of the military who are gay and lesbian. The result is one of the most expansive studies ever done on military personnel issues, and I applaud the time that was taken to arrive at solid, defensible conclusions.

More critically, I was gratified to see that the working group focused their findings and recommendations, rightly, on those who would be most affected by a change in the law: our people, all of our people. And so for the first time, the chiefs and I have more than just anecdotal evidence and hearsay to inform the advice we give our civilian leaders. We've discussed this issue extensively amongst ourselves and with the secretary, and the chiefs and I met with the president as

recently as yesterday.

I only want to add three points to what the secretary's already laid out.

First, I think it's noteworthy that the working group found strong leadership to be the single most important factor in implementing any repeal. That may sound fairly obvious, but it is a key, critical point.

We all have our opinions, and those opinions matter. This is without question a complex social and cultural issue. But at the end of the day, whatever the decision of our elected leaders may be, we in uniform have an obligation to follow orders. When those orders involve significant change such as this would, we need to find ways to lead the way forward. Our troops and their families expect that from us, and I think the American people do as well.

Second, we've heard loud and clear that our troops also expect us to maintain high standards of conduct and professionalism, both as we move forward in this debate and should repeal occur. We treat people with dignity and respect in the armed forces, or we don't last long. No special cases, no special treatment, if we're going to continue to comport ourselves with honor and hold ourselves accountable across the board to impeccably high standards, repeal or no repeal.

Finally, the report shows that however low the overall risk of repeal may be with respect to readiness, cohesion and retention, it is not without its challenges. We can best address those challenges by having it within our power and our prerogative to manage the implementation process ourselves.

Should repeal occur, I share the secretary's desire that it come about through legislation -- through the same process with which the law was enacted, rather than precipitously through the courts. I further hope that such debate in the Congress will be as fully informed by the good work done in this report as my advice to the secretary and to the president is.

Thank you.

Q: Secretary Gates, you said it would be unwise to proceed with repeal until there is more groundwork. How long do you envision that process lasting? And is this a concern and a recommendation that is shared by the White House in -- as far as once Congress acts there still being a period in which the policy is in place?

Admiral Mullen, do you also share that recommendation?

SEC. GATES: Well, first of all, just to be clear, what we're talking about is that, should the Congress vote to repeal the law, what we are asking for is the time subsequent to that to prepare adequately before the change is implemented in the force. How long that would take, frankly, I don't know. There is the -- the report, as you will see in the implementation plan, lays out an ambitious agenda of things that need to be done, including not only leadership training but training of a military force of over 2 million people.

I would say this. I think we all would expect that if this law is implemented, the president would be -- is -- if repeal is passed, the president would be watching very closely to ensure that we don't dawdle or try to slow-roll this. So I think his expectation would be that we would prepare as quickly as we properly and comprehensively could, and then we would be in a position to move toward the certification. But how long that would take I think -- I don't know.

ADM. MULLEN: There will -- there will be level -- there is a level of risk here, as is laid out in the report. And I would hope you spend as much time on the implementation plan as the report, because the implementation plan certainly from all the military leadership is strongly endorsed should this law change.

And it is in that implementation plan that the risk levels are mitigated, and principally mitigated through leadership -- certainly the training, the guidance, but the engagement of the leadership. And having enough time to do that is critically important as we would look at implementation. That's what really mitigates any risk that's out there.

Q: Mr. Secretary, you said the chiefs are less sanguine than the working group. What specifically have they told you about their concerns? And why in a time of war accept any increase in the level of risk?

SEC. GATES: Well, the chiefs will speak for themselves on Friday. And the chairman has spent much more time with them than I have on this. I think -- I think it's fair to say that their concerns revolve around stress on a force after nearly 10 years of war. And I think they are concerned about the higher levels of negative response from the ground combat units and the Special Operations units that I have talked about in my -- in my remarks.

I think that -- I would just like to go back and underscore the chairman's point, and that is the level of risk is tied intimately to the quality of preparation. And to do this -- so I guess I would put it this way: If a court ordered us to do this tomorrow, I believe the force -- the risk to the force would be high, if we had no time to prepare.

If we have plenty of time to prepare the force, to prepare the leadership, I think the more effectively we do that preparation the lower the risk.

Chairman?

ADM. MULLEN: I've engaged, actually, many, many times with the chiefs over the last -- over the last many months, and so we've had very, very extensive discussions about this. And from the standpoint of a change in the law -- I mean, my perspective is, as what I would call my -- certainly was my personal opinion, is now my professional view, that this is a policy change that we can make. And we can do it in a relatively low-risk fashion, given the time and given the ability to mitigate whatever risk is out there through strong leadership.

In fact, part of this is the fact that we have been at war for so long. We have -- one of the discussions about this is affecting combat effectiveness or combat readiness. I've never been associated with a better military than we are right now and better military leaders. And I have tremendous confidence that should this change, that they'll be able to implement it, very specifically.

Q: That's true, but what about the other chiefs?

ADM. MULLEN: Well, again, the chiefs will speak for themselves on Friday.

Q: Mr. Secretary, you raised the issue of combat arms, and the report shows that of those polled, 50 percent in Army combat arms are opposed, 60 percent in Marine combat arms. And there's also the issue of chaplains. The report says that there's very strong opposition among the chaplains there as well.

What would you say to both groups? How would you deal with this with both groups?

SEC. GATES: Well, the interesting -- one of the other considerations in this that the -- that the report revealed is even in combat arms units, those who -- among those who believed they had served with a gay person before, the level of comfort with going forward was something like 90 percent.

So part of this is a question of unfamiliarity. Part of it is stereotypes. And part of it is just sort of inherent resistance to change when you don't know what's on the other side.

And so I think -- I think that the contrast between the significant levels of concern for those who had -- who said they had never served with someone who is gay as opposed to those who had is an important consideration. But what I would say to them is, you know, frankly, if the Congress of the United States repeals this law, this is the will of the American people, and you are the American military, and we will do this, and we will do it right, and we will do everything in our power to mitigate the concerns that you have.

Q: And on the chaplains?

SEC. GATES: Saying --

Q: The report -- (inaudible) -- a very large number view homosexuality as a sin or an abomination.

SEC. GATES: And the report -- the report identifies that the chaplains already serve in a force many of whose members do not share their values, who do not share their beliefs. And there is an obligation to care for all. But it also is clear that the chaplains are not going to be asked to teach something they don't believe in. And so I think that the -- I think the report is pretty clear on that.

Q: Thank you. Non-"don't ask, don't tell" question quick?

SEC. GATES: Sure.

Q: WikiLeaks. Post-WikiLeaks reaction. What's your sense on whether the information-sharing climate and environment created after 9/11 to encourage greater cooperation and transparency among the intelligence communities and

the military led to these three massive data dumps?

And how concerned are you now there may be an overreaction to clamp down on information dispersal because of the disclosures?

SEC. GATES: One of the common themes that I heard from the time I was a senior agency official in the early 1980s in every military engagement we were in was the complaint of the lack of adequate intelligence support. That began to change with the Gulf War in 1991, but it really has changed dramatically after 9/11.

And clearly the finding that the lack of sharing of information had prevented people from, quote/unquote, "connecting the dots" led to much wider sharing of information, and I would say especially wider sharing of information at the front, so that no one at the front was denied -- in one of the theaters, Afghanistan or Iraq -- was denied any information that might possibly be helpful to them. Now, obviously, that aperture went too wide. There's no reason for a young officer at a forward operating post in Afghanistan to get cables having to do with the START negotiations. And so we've taken a number of mitigating steps in the department. I directed a number of these things to be undertaken in August.

First, the -- an automated capability to monitor workstations for security purposes. We've got about 60 percent of this done, mostly in -- mostly stateside. And I've directed that we accelerate the completion of it.

Second, as I think you know, we've taken steps in CENTCOM in September and now everywhere to direct that all CD and DVD write capability off the network be disabled. We have -- we have done some other things in terms of two-man policies -- wherever you can move information from a classified system to an unclassified system, to have a two-person policy there.

And then we have some longer-term efforts under way in which we can -- and, first of all, in which we can identify anomalies, sort of like credit card companies do in the use of computer, and then finally, efforts to actually tailor access depending on roles.

But let me say -- let me address the latter part of your question. This is obviously a massive dump of information. First of all, I would say unlike the Pentagon Papers, one of the things that is important, I think, in all of these releases, whether it's Afghanistan, Iraq or the releases this week, is the lack of any significant difference between what the U.S. government says publicly and what these things show privately, whereas the Pentagon Papers showed that many in the government were not only lying to the American people, they were lying to themselves.

But let me -- let me just offer some perspective as somebody who's been at this a long time. Every other government in the world knows the United States government leaks like a sieve, and it has for a long time. And I dragged this up the other day when I was looking at some of these prospective releases. And this is a quote from John Adams: "How can a government go on, publishing all of their negotiations with foreign nations, I know not."

To me, it appears as dangerous and pernicious as it is novel."

When we went to real congressional oversight of intelligence in the mid-70s, there was a broad view that no other foreign intelligence service would ever share information with us again if we were going to share it all with the Congress. Those fears all proved unfounded.

Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think -- I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments -- some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation.

So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another.

Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.

Q: And on that same subject. On that same subject. Did either of you reach out to any of your counterparts in advance of this leak and warn them, or even apologize in advance for what might come out?

SEC. GATES: I didn't.

ADM. MULLEN: I did.

Q: Who was it?

ADM. MULLEN: To General Kayani in Pakistan.

SEC. GATES: Yeah?

Q: Sir, you've said that -- you know, on "don't ask, don't tell" -- you've said that now is the time to do this, largely because of the threat of legal action. I'm just wondering, if that legal action wasn't looming, how much do you think that this would -- this is the right thing to do now?

And I'm wondering just how hard you intend to lobby those on the Hill to get them to sway to the other side.

SEC. GATES: Well, you know, I don't spend much time thinking about the world as I wish it were. The reality is the court issue is out there, and, in my view, does lend urgency to this.

You know, the question was -- has been raised, well, maybe the courts would give us time, to which my answer is, maybe, maybe not. We just don't know. But the one path we know gives us the time and the flexibility to do this is the legislative path. And I don't know how fast the courts are going to move on this, but what we've seen seems to be more and more action in the courts in the last year or two. And that's what gives me a sense of urgency about. My greatest fear is what almost happened to us in October, and that is being told to implement a change of policy overnight.

Q: Yeah. Mr. Secretary, Senator McCain is now arguing that this report is the wrong report, and that it won't get to the bottom of how this could -- the repeal could affect unit cohesion or morale. I'm wondering if you or Admiral Mullen have any reaction to that response to the report.

SEC. GATES: Well, I think -- I think that, in this respect -- and I obviously have a lot of admiration and respect for Senator McCain -- but in this respect, I think that he's mistaken. I think this report does provide a sound basis for making decisions on this law.

Now, people can draw different conclusions out of this report; the comments, for example, in the -- in the evaluation in the report of the higher levels of concern for -- among the combat arms units and in the Marine Corps and so on.

So people can read this and potentially come to different conclusions, but in terms of the data and in terms of the views of the force, it's hard for me to imagine that you could come up with a more comprehensive approach.

We had -- we had something on the order of 145,000 people in uniform answer the questionnaire, the survey. We had something on the order of 40,000 to 45,000 spouses respond to the -- to that survey. Tens of thousands of people reached in other ways. So I think there is no comparable source of information or data on attitudes in the force than this report, and it's hard for me to imagine another effort taking a much different approach than this report did.

ADM. MULLEN: And its main thrust was on combat effectiveness, mission effectiveness, readiness, unit cohesion, et cetera. And that data -- again, I agree with the Secretary, you can certainly pick parts of it that read -- you might want to read differently. But the data's very compelling, in particular with respect to those issues. I mean, that was the main reason for the report.

Q: I wonder if you could talk a little bit more about how you would see this implemented and what you mean by giving time. For example, would you, say, not have openly gay -- if the law is changed, would you not put openly gay servicemembers into units that units that are about to deploy to Afghanistan in 2011 or so? Would you -- would you take -- would you integrate the non-combat-arms units first? I mean, what -- could you describe a little bit more of what your implementation plan would be?

SEC. GATES: Well, first of all, the repeal of the law would not, as I understand it -- now I'm not a lawyer -- but as I understand it -- and maybe Jeh Johnson can address this question for you more authoritatively when he comes up here.

But as I understand it, until we certify, until the president, the secretary of Defense and the chairman of the Joint Chiefs certify that we -- that the U.S. military is ready to implement the law, the repeal, the existing -- the currently existing rules would continue to apply. And so you would have a period of preparation, if you will, that, as I indicated earlier, I don't know necessarily how long that would take.

ADM. MULLEN: And, Julian -- and from my perspective, we are one military. We are one military.

SEC. GATES: Two more questions. Yeah.

Q: Mr. Secretary, you have spoken quite clearly about how you support the president's position on this, and how you're urging the Senate to act, and how this needs to be done in an orderly and measured way.

But you haven't said so much over time about your personal beliefs on "don't ask, don't tell." Do you feel personally that it's been unjust or wrong for gays and lesbians not to be able to serve their country openly? Or are you comfortable with the idea of openly integrating the military?

SEC. GATES: I think that -- in my view -- one of the things that is most important to me is personal integrity. And a policy or a law that in effect requires people to lie gives me -- gives me a problem. And so I think it's -- I mean, we spend a lot of time in the military talking about integrity and honor and values.

Telling the truth is a pretty important value in that scale. It's a very important value. And so for me, and I thought the admiral was -- that Admiral Mullen was eloquent on this last February -- a policy that requires people to lie about themselves somehow seems to me fundamentally flawed.

Last question.

Q: Earlier in the process, General Conway, when raising concerns about this, floated the idea of separate barracks and said that, you know, Marines might not be comfortable sharing barracks with openly gay troops. Is that even on the table, or is that -- would the idea of separate barracks, separate housing, separate showers just be off the table?

SEC. GATES: We can get into the details of that -- or you can with Jeh and General Ham. But the bottom line of the report is no separate facilities.

Thank you.

The New York Times

The Caucus

The Politics and Government Blog of The Times

NOVEMBER 30, 2010, 7:30 PM

Gates on Leaks, Wiki and Otherwise

By ELISABETH BUMILLER

Defense Secretary Robert M. Gates has regularly denounced Wikileaks in recent months for its extensive disclosures, and as a former director of central intelligence he places high value on secrets.

But at a Pentagon briefing on Tuesday, Mr. Gates, who plans to retire next year, responded to a question about Wikileaks' disclosure of 250,000 diplomatic cables by meandering down a different path.

Here is some of what he said:

"Let me just offer some perspective as somebody who's been at this a long time. Every other government in the world knows the United States government leaks like a sieve, and it has for a long time. And I dragged this up the other day when I was looking at some of these prospective releases. And this is a quote from John Adams: 'How can a government go on, publishing all of their negotiations with foreign nations, I know not. To me, it appears as dangerous and pernicious as it is novel.'

"Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments -- some governments -- deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation.

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ATTACHMENT E



U.S. DEPARTMENT OF STATE

DIplomacy in Action

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Remarks With Kazakh Foreign Minister Saudabayev After Their Meeting

Remarks

Hillary Rodham Clinton

Secretary of State

Palace of Independence

Astana, Kazakhstan

December 1, 2010

MODERATOR: (Via translator) Welcome to (inaudible) Chairman of the OSCE, State Secretary and Minister of Foreign Affairs of Kazakhstan Saudabayev and U.S. Secretary of State, Hillary Clinton.

FOREIGN MINISTER SAUDABAYEV: (Via translator) (Inaudible), first of all, to thank you for your great interest in the work of this Astana summit, and wish you fruitful work in the capital of Kazakhstan.

A meeting of the head of our state, Nazarbayev, and the head of the U.S. delegation at this summit, Mrs. Hillary Clinton, has just finished. And, as President Nazarbayev stressed, the participation of State Secretary Clinton in this (inaudible) summit is one more testimony to the fact that our strategic partnership between our two countries has been further developed.

At the meeting there was a deep and detailed exchange of opinions on the most topical issues of this Astana summit, which was (inaudible) important political results. The two sides have agreed that Kazakhstan's effective chairmanship, including this first summit, OSCE Summit in the 21st century, is giving an impetus to the further development of cooperation in the OSCE space.

Another part of this summit is the response to transnational threats, especially from outside the OSCE area; above all, from Afghanistan. Situations in Kyrgyzstan and Central Asian countries have been discussed.

It was stressed that, in order to achieve stability and sustainable development of the region's countries -- thought through policies important and the rule of law, as well as implementation of human rights. The two parties agreed that development is only achieved through the rule of law with strong democratic institutions. As far as the humanitarian dimension is concerned, it was noted that Kazakhstan chairmanship was trying to achieve interaction with civil society, and through the participation of NGOs in OSCE work, also at this summit.

It was also stressed how important it was to normalize relations of the Islamic world with the West, and to achieve an effective dialogue between civilizations and to increase tolerance. These are issues that are always in the central focus of the Presidents Nazarbayev and Barack Obama. And Kazakhstan will continue to promote those issues.

As the chairman of the Organization of the Islamic Conference, we have paid a lot of attention to further development of the strategic partnership between our two countries, including in such areas like security, political independence, economic and trade relations, as well as promotion of democracy. We have reconfirmed our determination to continue our cooperation in the area of nuclear nonproliferation and disarmament, including the celebration of a Nuclear Security Summit.

At the meeting in Washington in April this year, at the meeting of the two presidents it was also stressed to take Kazakhstan in the economic area is contributing to the implementation of the joint initiative of the United Nations and the United States on global food security. And this connection of two countries has recently started to implement major projects for agriculture that would profit from the most up-to-date U.S. technologies. Nazarbayev also established a university that established good cooperation with the leading U.S. universities. And this opens up better prospects for technological cooperation.

Kazakhstan has highly appreciated the support provided for security in Afghanistan in -- the two sides also stressed an important contribution of Kazakhstan to assistance to Afghanistan.

Our country also hosts 1,000 Afghan students to complete their university studies at a cost of 50 million U.S. dollars. Fifty-five Afghans have already started their studies.

And Kazakhstan has now -- has joined the security forces, international security forces, in Afghanistan.

I am quite convinced that today's meeting between President Nazarbayev and State Secretary Clinton has given a new impetus to the entire development of the -- in the entire area of our bilateral relations.

Distinguished State Secretary, let me welcome you once again, from the bottom of my heart, in this capital of Astana. You, being an international personality and a great friend of Kazakhstan, we are very thankful to you for your consistent support and help that we have noticed in very specific ways during our chairmanship at the OSCE. And I would like to express my hope that we continue our fruitful and effective cooperation for the good of our peoples and countries. And I give you the floor. Thank you. (Applause.)

This applause is a sign of your support of our cooperation.

SECRETARY CLINTON: Well, let me begin by expressing what a pleasure it is for me to be here in Astana. And I want to thank the president, the foreign minister, and the people of Kazakhstan for their hospitality and warm welcome. I fondly remember my first visit here in the 1990s, when Kazakhs were just beginning to chart their new course as an independent nation. I was proud that the United States was the first country to recognize Kazakhstan, and to welcome you into the community of nations. And today Kazakhs can be proud of all you have accomplished, and our two nations can be confident in the strength of our strategic partnership.

The relationship between the United States and Kazakhstan is rooted in mutual respect and mutual interest. Kazakhstan may be a young nation, but it is home to an ancient and rich culture, which I saw for myself at the museum in Almaty 13 years ago. America is still a relatively young country, yet we deeply respect the hopes of the people of Kazakhstan, and your aspirations for a better future, and we seek to broaden our partnership and to work with you to continue making progress toward developing into a stable, secure, democratic, and prosperous nation that is a leader in the region and beyond.

We also look forward to cooperating with the Kazakh private sector and NGOs that are working for free markets, the rule of law, and a vibrant civil society in which citizens can exercise their full range of human rights. These goals will take continued hard work. But America believes in Kazakhstan's promise, and we are committed to your future.

Today's OSCE Summit is a testament to both Kazakhstan's valued role in the international community, and the strong ties between our two countries. As the first former Soviet Republic to lead the OSCE as an independent nation, Kazakhstan has helped to focus attention on Central Asia's challenges, as well as its many opportunities.

As the foreign minister said, we have discussed security, the economy, the environment, democracy, human rights, and tolerance. The United States is committed to the OSCE, and we and our partners are working to empower it to take an even more effective role, including the encouragement of more transparency and cooperation between and among militaries, helping resolve long-standing conflicts, and standing up against attacks on civil society and journalists. Our discussions here in Astana have been constructive and substantive.

Last night, I met with many of the participants who took part in the independent conference of non-governmental organizations that ran parallel with the summit. I was impressed by their effort and energy on crucial challenges, including protecting fundamental freedoms. They know what we all know, that a thriving civil society is a vital building block of democracy, and that disparate, diverse voices must be heard and supported.

In the discussion that I had with both the president and the foreign minister, I thanked Kazakhstan for your support of the international mission in Afghanistan, and for all you are doing to help the Afghan people, particularly the very kind invitation for 1,000 students to continue their education here, in Kazakhstan. This will enable these young people to contribute to Afghanistan's development. I also thanked Kazakhstan for the recently concluded air transit agreement that will help ensure the delivery of critical resources to Afghanistan, and I welcomed Kazakhstan as the newest member of the International Security Assistance Force, which now includes 49 countries.

We discussed our shared interest in curbing nuclear proliferation, and safeguarding vulnerable nuclear material. Kazakhstan has long been a leader on this issue, and the United States deeply values our partnership. Along with the United Kingdom, our nations recently secured more than 10 metric tons of highly-enriched uranium, and 3 metric tons of weapons-grade plutonium here in Kazakhstan. That is enough material to have made 775 nuclear weapons. And now we are confident it will never fall into the wrong hands. This is a milestone of our cooperation, and a major step forward in meeting the goals set at this year's Nuclear Security Summit of securing all nuclear material within four years.

I also shared with the minister and the president the discussions that I have had with civil society leaders. I expressed our continued interest in Kazakhstan's national human rights action plan, and reforms to electoral, political, and labor laws. I assured him that America's commitment to working with Kazakhstan and the other nations of Central Asia to advance democracy and human rights will not end when the summit is over.

On all of these and other fronts, Kazakhstan and the United States are making progress together. The bonds we are forging between our governments and our peoples are making both of our countries -- and, indeed, the region and the world -- more secure and prosperous. And surrounded by the energy and optimism that one feels in this new dynamic city, I look forward with confidence to a positive future for Kazakhstan and its people.

So again, Minister, let me thank you for your leadership and your hospitality. (Applause.)

FOREIGN MINISTER SAUDABAYEV: (Via translator) Thank you very much. Please ask questions. According to the law of hospitality, first I give the floor to our guests.

MODERATOR: (Via translator) Mr. Burns, please.

QUESTION: A question for Secretary Clinton. Thank you. On Iran, now that the date has been set for talks in Geneva -- although it's not clear that the agenda itself has been agreed -- can you say what exactly it is that the United States hopes and expects to achieve? And also, given the outcome a year ago, when an apparent agreement unraveled rather quickly, is this really Iran's last chance? Thank you.

SECRETARY CLINTON: Well, Bob, first, we are encouraged that Iran has agreed to meet in Geneva next week with representatives of the P-5+1. This is an opportunity for Iran to come to the table and discuss the matters that are of concern to the international community: first and foremost, their nuclear program.

The agreement you referred to that was a result of the negotiations of last fall, the so-called Tehran Research Reactor agreement, will certainly be discussed, but would have to be modified in order to take into account what is known through the IAEA and other sources of the developments in Iran's nuclear program since that agreement was first reached and then not implemented.

The international community has been very clear. Iran is entitled to the use of civil nuclear power for peaceful purposes. It is not, however, entitled to a nuclear weapons program. And the purpose of the negotiations will be to underscore the concern of the entire international community in Iran's actions and intentions. We hope that Iran will enter into these negotiations in the spirit that they are offered. We want to see Iran take a position as a responsible member of the international community. But in order to do that, it must cease violating international obligations, cease any efforts it is making and has made in the past toward achieving nuclear weapons.

So, that is what we will be focused on. And the agenda can be more comprehensive than that, but that is the principal purpose of the meeting in Geneva.

QUESTION: (Via translator) I have a question for Mr. Saudabayev. It is known that Kazakhstan is going to be succeeded as chairmanship, but will remain a member of the troika, of the threesome of the OSCE. Could you please tell us in which areas are you going to work next year?

FOREIGN MINISTER SAUDABAYEV: (Via translator) Kazakhstan is going to continue being active as a member of the OSCE, and to contribute towards the search for solutions of problems, and the implementation of the decisions to be taken at this summit. For one year we will remain a troika member. And the processes that we hope to have been given an impetus will be continued further by our successors, and we will continue to work together in close contact with them.

And as to the internal life of our country, the processes have become (inaudible) as part of our further development of our country and the economic and social area, as well as the democratic development. As part of the implementation of the national program "The Way to Europe," this is also going to be continued.

MODERATOR: (Via translator) Mr. Andy Quinn is an American press member.

QUESTION: Madam Secretary, this trip has given you your first chance to meet personally with foreign leaders following the Wikileaks release over the weekend. I am wondering if you could tell us how much of a topic it's been in your discussions, what sort of responses you may have heard. And has anyone expressed any worry about U.S. trustworthiness, going forward?

And, for the minister, your government saw some embarrassing details also come to light in the Wikileaks release. What is your reaction to this? And do you feel that this type of release will change the way the U.S. is perceived as a diplomatic partner, going forward?

SECRETARY CLINTON: Well, Andy, I have had the opportunity to meet with many leaders here at the summit in Astana. We have talked about many important issues, and the work that we are doing together to solve global problems. I have certainly raised the issue of the leaks in order to assure our colleagues that it will not in any way interfere with American diplomacy or our commitment to continuing important work that is ongoing. I have not had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance to us both, going forward.

As I have said, I am proud of the work that American diplomats do, and the role that America plays in the world. Both President Obama and I are committed to a robust and comprehensive agenda of engagement. It's one of the reasons that I am here in Astana at the OSCE Summit. And I am confident that the work that our diplomats do every single day will go forward. And I anticipate that there will be a lot of questions that people have every right and reason to ask, and we stand ready to discuss them at any time with our counterparts around the world.

FOREIGN MINISTER SAUDABAYEV: (Via translator) I believe that what has happened is part of a normal cost, or a normal price, that one has occasionally to pay while we lead our work. That is why we will be able to live through this incident, as we have through others. And, as head of the Ministry of Foreign Affairs in my country, now declare that this will have no effect for our strategic partnership between the United States and Kazakhstan. Thank you.

MODERATOR: (Via translator) One question from the Kazakhstan members of the press.

QUESTION: (Via translator) I have a question to both the Secretary of State and Mr. Saudabayev. It has been mentioned that right after the meeting between the two presidents, Nazarbayev and Obama (inaudible). I still would like to know what is going to happen next, apart from the operation on the Nazarbayev's university and the plans for agricultural cooperation. Are there any other agreements or projects to be implemented between our two countries? And what could prevent them from happening? Any -- is there anything subjective that -- or personal -- that might affect those plans?

And one more question to State Secretary Clinton. It is known that some amendments to the act on cyber space have been adopted in the United States that would entitle the U.S. President to regulate the exchange of information in the Internet. I would like to know more about this concerning the amendments to the act on cyber space. Thank you.

FOREIGN MINISTER SAUDABAYEV: (Via translator) At this briefing, we don't have the opportunity to discuss prospects for general cooperation and specific areas of cooperation in our bilateral relations, because this is a huge area that has several dimensions. I can only take note that we have, once again, reconfirmed that we both have a very optimistic outlook, as far as our bilateral relations are concerned, and we have a lot of potential in this area. Thank you.

SECRETARY CLINTON: And I would add we discuss not only the importance of our strategic partnership between our two countries, but how the United States and Kazakhstan can work together in the region and beyond. We value Kazakhstan's role and influence in the region. It was critical, after the events of last spring affecting Kyrgyzstan, to have Kazakhstan play a leadership role. The United States worked closely with Kazakhstan. The Minister and I talked several times about what Kazakhstan was doing to assist Kyrgyzstan, and we are continuing to work together and supporting Kazakhstan's influential position in trying to help stabilize Kyrgyzstan.

We discussed further what additional regional steps might be considered to better integrate the Central Asian nations. I believe that this is an important area of the world. Kazakhstan has done well, economically, and with its development. Now we need to see how to work together to assist the other nations in the region to develop more successfully and inclusively.

With regard to cyber security and cyber space, the United States is, like many nations, addressing the opportunities and the challenges and the threats that are posed in cyber space. We want the Internet to be a vehicle for the free exchange of information, yet we are well aware of the dangers that can be posed to the misuse of the Internet to all kinds of institutions

and networks. And so this is not only a matter of concern for the United States; we think this deserves attention at the highest international levels, and that is beginning to occur.

MODERATOR: (Via translator) Thank you very much. That will be it. We don't have any time left. Thank you.

PRN: 2010/T36-5

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Clinton: WikiLeaks won't hurt U.S. diplomacy

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By Geoff Wagner, Washington, AP

Secretary of State Hillary Rodham Clinton, center, reads a statement as she sits next to German Chancellor Angela Merkel at the start of the OSCE Summit at the Palace of Independence in Astana, Kazakhstan on Wednesday.

ASTANA, Kazakhstan (AP) — The leak of thousands of sensitive U.S. embassy cables will not hurt American diplomacy, Secretary of State Hillary Rodham Clinton declared Wednesday at a security summit.

Clinton said she has discussed the revelations published on the WikiLeaks website with her colleagues at the summit in Astana, the capital of Kazakhstan. The event is the first major international meeting of leaders and top diplomats since the memos began appearing on the website and in international publications this week.

The secret memos published by WikiLeaks contain frank details on several leaders attending the Organization for Security and Cooperation in Europe meeting. One note allegedly written by a U.S. diplomat in Europe describes Kazakhstan President Nursultan Nazarbayev as "home-obsessed and given to taking refuge from the often-foggy capital at a holiday home in the United Arab Emirates."

Other prospective conference delegates described less than flattering in the leaked cables include Italian Prime Minister Silvio Berlusconi and Russian President Dmitry Medvedev.

"I have certainly raised the issue of the leaks in order to ensure our colleagues that it will not in any way interfere with American diplomacy or our commitment to continuing important work that is ongoing," Clinton said. "I have not any had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance to us both going forward."

Several officials at the summit echoed her comments.

British Deputy Prime Minister Nick Clegg, who met Wednesday with Clinton, released a statement saying the "recent WikiLeaks disclosures would not affect our uniquely strong relationship."

Kazakh Foreign Minister Kanat Saudabayev also said "this will have no bearing on our strategic relationship."

The Obama administration has harshly criticized the leaking of the cables, saying the details in them could put lives at risk.

"I anticipate that there will be a lot of questions that people have every right and reason to ask, and we stand ready to discuss them at any time with our counterparts around the world," Clinton added.

On the sidelines of the summit, Clinton and her Belarusian counterpart, Sergei Martynov, announced that the former Soviet republic of Belarus will give up its stockpile of material used to make nuclear weapons by 2012.

That's a significant step toward efforts aimed at reducing the risk of nuclear materials falling into the hands of terrorists, and follows similar commitments made by other former Soviet republics, including Kazakhstan. Washington will provide technical and financial help to enable Belarus to dispose of its highly enriched uranium stocks.

Clinton said the Obama administration is encouraged that Iran has agreed to return to Geneva for a new round of international talks on its disputed nuclear program. However, a uranium-exchange agreement that was announced following talks with Iran in October 2009 — but which later unraveled — would have to be modified to take into account the fact that Iran has since produced more enriched uranium, she said.

The OSCE was born in the 1970s to nurture rapprochement between Cold War enemies. But the organization has in recent years struggled to define a clear purpose — an anxiety reflected in the speeches of many leaders at the Astana summit. Failure to achieve any breakthrough in Europe's various territorial stalemates, from Moldova's separatist Trans-Dniester region to the perennial tension between Armenia and Azerbaijan over the contested Nagorno-Karabakh region, has served as an embarrassing reminder of the OSCE's weakness to effect significant change.

In a thinly veiled broadside at Russia, Clinton chided efforts to obstruct the placement of an OSCE mission in Georgia, whose own territorial integrity has been undermined by Moscow's diplomatic and financial support for the breakaway regions of Abkhazia and South Ossetia.

"It is regrettable that a participating state has proposed to host a mission, and the OSCE has not been allowed to respond," Clinton said.

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Demetrius7 (3 friends, send message) wrote: 12/2/2010 5:45:18 PM

WONT HURT US Diplomacy??? REALLY??

MAY BE, but I am sure Israeli-Kazakh mixing tycoon Alexander Machkevich, worth \$3.3 billion went to kick the US Diplomat's @ss for back stubbing him after 4 dinner invitations: (read on...)

In a somewhat catty missive, the U.S. diplomat reveals he was unimpressed with Machkevich's parties.

"It is not clear what Machkevich is spending his billions on, but it is certainly not culinary talent. On all four occasions the Ambassador has eaten at one of his houses, the menu has been similar and focused on beshbarmak (boiled meat and noodles) and plov. The wait staff appeared to be graduates of a Soviet canteen training academy. The wine, at least, was somewhat upscale with reasonably good French vintage bottles uncorked for the guests. The Astana residence has wooden plaques on the doors that would fit in nicely in a Wyoming hunting lodge but are somewhat out of touch with the upscale "Euro-remont" that is so popular among the Kazakhstan elite." (I got this passage of the leak from the Forbes.com website, just in case you are wondering)

SO think this guy will invite another US diplomat to his Parties or even have TRUST in the US Diplomacy?

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OrlandoJen (133 friends, send message) wrote: 12/2/2010 2:25:03 PM

There is NO US diplomacy. The leaks demonstrate our entire program is based on back door discussions with thugs along with bribes thrown in at every turn. We go around the world with suit cases of money buying up whatever we need.

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metee401 (127 friends, send message) wrote: 12/2/2010 2:09:57 PM

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Good Sir (0 friends, send message) wrote: 1d ago

Last time, a low level soldier at DoD leaked. This time, I think, a high level DoD official leaked.

I agree. What is more silly is trying to steer public opinion with her out to lunch remarks here. Those emails and memos appeared to have been written by arrogant, self-bloating, thoughtless

ATTACHMENT F

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FOREIGN POLICY

Clinton: WikiLeaks cables show diplomacy at work

December 04, 2010 | By the CNN Wire Staff

The confidential U.S. embassy cables posted online by the website WikiLeaks simply show "diplomats doing the work of diplomacy," U.S. Secretary of State Hillary Clinton said Saturday.

Clinton said she was not making light of the leaked documents, which reveal secret communications from U.S. diplomats around the world and have caused embarrassment for the United States and others.

"Everybody is concerned," she told reporters aboard her plane as it departed Bahrain, where she spoke at a conference. "Everybody has a right to have us talk to them, and have any questions that they have answered, but at the end of the day — as a couple of analysts and writers are now writing — what you see are diplomats doing the work of diplomacy."

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The secretary made the comments off-camera but on the record.

Clinton said she has been working hard to re-establish trust and relationships that may have been harmed by the leaks. Many countries had questions that she had to answer, and she has had to reassure them, but she said many also realize U.S. outreach and diplomacy will continue.

"But I haven't seen everybody in the world, and apparently there's 252,000 of these things out there in cyberspace somewhere," she said of the documents, "so I think I'll have some outreach to continue doing over the next weeks just to make sure as things become public, if they raise concerns, I will be prepared to reach out and talk to my counterparts or heads of state of government."

Asked whether President Obama has had to call any heads of state, Clinton said she wasn't sure, though he had made recommendations for calls and would raise the issue as he speaks to counterparts on other matters.

"In a way, it should be reassuring, despite the occasional tidbit that is pulled out and unfortunately blown up," Clinton said. "The work of diplomacy is on display, and you know, it was not our intention for it to be released this way — usually it takes years before such matters are. But I think there's a lot to be said about what it shows about the foreign policy of the United States."

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December 4, 2010

From WikiLemons, Clinton Tries to Make Lemonade

By MARK LANDLER

MANAMA, Bahrain — When American diplomats get together these days, there is lots of dark talk about the fallout from the sensational disclosure of secret diplomatic cables. Will angry foreign governments kick out ambassadors? Will spooked locals stop talking to their embassy contacts?

Behind all the public hand-wringing, however, there is another, more muted reaction: pride.

The WikiLeaks affair has turned an unaccustomed spotlight on the diplomatic corps — pinstriped authors who pour their hearts and minds into cables, which are filed to the State Department and, until now, were often barely read by desk officers, let alone senior diplomats.

Whatever damage the leaks may do, and nobody doubts it could be substantial, they have showcased the many roles of the Foreign Service officer in the field: part intelligence analyst, part schmoozer, part spy — and to judge by these often artful cables, part foreign correspondent.

The pride of authorship is shared by their boss, Secretary of State Hillary Rodham Clinton, who found a silver lining in the disclosures, even after she spent last week trying to smooth the feathers of foreign leaders described in the cables as feckless, profligate, vain, corrupt or worse.

"What you see are diplomats doing the work of diplomacy: reporting and analyzing and providing information, solving problems, worrying about big, complex challenges," Mrs. Clinton said to reporters at the end of a four-country trip to Central Asia and the Persian Gulf that wound up being a contrition tour.

"In a way," she said, "it should be reassuring, despite the occasional tidbit that is pulled out and unfortunately blown up."

Not all the tidbits reflect well on the diplomats, of course. Memos from the United States Embassy in Georgia, for example, showed that it relied so heavily on the Georgian government for intelligence that it badly misjudged the country's actions in its war with Russia in 2008.

But the overall quality of the cables — their detail, analysis, and in some cases, laugh-out-loud humor — has won fans in unlikely places. "It's very entertaining reading," said Aigul Solovyeva, a member of Parliament in Kazakhstan who met Mrs. Clinton there this week.

Richard E. Hoagland, the ambassador to Kazakhstan, thinks good cable-writing is so essential that he has written a guide for junior diplomats, "Ambassador's Cable Drafting Tips." Many of the tips would be familiar to any cub reporter trying to get an editor to bite on a story.

"The trick is to catch readers' attention," he advises. "The first three to five words are all they will see in their electronic queue."

His specific recommendations? Avoid flabby writing, citing as a typically egregious example any memo that starts: "The ambassador used the opportunity of the meeting to raise the issue of..."

And work on storytelling: "Despite what some in Washington will tell you, there is nothing at all wrong with colorful writing, as long as it communicates something." But he adds a caveat: "Cute writing is never acceptable — cute is for toddlers, not for professional diplomats."

Mr. Hoagland, who accompanied Mrs. Clinton to meetings this week, declined to discuss the substance of the leaked cables. But he was happy to discuss style. As a general rule, he said he instructs staff members to think like journalists. "Not everything we churn out is great writing," he said, "but we try to keep up the standards."

The embassy in Kazakhstan met many of Mr. Hoagland's standards for cable-writing, even before he became ambassador there. Cables about Kazakhstan's high-living leaders are written in a satirical tone worthy of Borat, the fictional (and wild) Kazakh played in the movie by Sacha Baron Cohen.

One described Kazakhstan's defense minister turning up drunk for a meeting with an American official, "slouching back in his chair and slurring all kinds of Russian participles." He explained that he had just been at a cadet graduation reception, "toasting Kazakhstan's newly-commissioned officers."

The memo concluded: "Who was toasted more — the defense minister or the cadets — is a matter of pure speculation."

A 2006 cable from the embassy in Moscow showed that the staff there was also alert to the literary quality of the events on which they reported, and the value of telling details. The memo offered an account of a society wedding in Dagestan in Russia's Caucasus, where guests threw \$100 bills at child dancers and took alcohol-sodden water-scooter jaunts on the Caspian Sea. But it also showed how the wedding was a "microcosm of the social and political relations of the North Caucasus."

For Mrs. Clinton, the pride in the diplomats' work is a small compensation for a difficult week in which she has discussed the WikiLeaks case with more than two dozen foreign leaders, working to soothe bruised egos and explain how the security breach happened.

The job of damage control has fallen mainly to her. President Obama has not called any foreign leaders about the disclosures. Defense Secretary Robert M. Gates, meanwhile, has been reserved even though the cables were believed to be purloined from a Department of Defense computer system by an army private, Bradley Manning, who is now in a military jail.

Mrs. Clinton's reaction to shouldering the burden has been every bit as artful as the cables that have landed her in so much trouble.

"It was a DoD system, and a DoD obviously military intel guy," she said. "But we're part of one government, and we're part of one country, and we have to work together, and that's what we're doing."

UPI NewsTrack TopNews

Published: Dec. 4, 2010 at 12:00 PM

Clinton on leaked documents: So what?

MANAMA, Bahrain, Dec. 4 (UPI) — The online publication of hundreds of thousands of U.S. secret documents is an example of diplomacy in action, Secretary of State Hillary Clinton said Saturday.

Clinton made the remarks aboard an aircraft leaving Bahrain about Wikileaks' recent release of some 250,000 diplomatic exchanges from U.S. officials around the world.

"What you see are diplomats doing the work of diplomacy," Clinton said.

Clinton told reporters the WikiLeaks Web site's publications raised concerns, but the U.S. government had nothing to apologize for to other governments, CNN said.

"The work of diplomacy is on display ... I think there's a lot to be said about what it shows about the foreign policy of the United States.

"I'll have some outreach to continue doing over the next weeks just to make sure as things become public, if they raise concerns, I will be prepared to reach out and talk to my counterparts or heads of state of government."

WikiLeaks has published three sets of classified U.S. documents since July pertaining to the wars in Iraq and Afghanistan and most recently, overall international relations. Wednesday, a White House news release said the government was investigating the sources of the leaks and the legality of their publishing.

South Korea swears in new defense minister

SEOUL, Dec. 4 (UPI) — South Korea on Saturday named Kim Kwan-jin as its new defense minister 11 days after a border skirmish with North Korea left four dead, including two marines.

Kim vowed to respond swiftly and forcefully to any antagonism from North Korea, the Yonhap news agency reported. His predecessor, Kim Tae-young had been criticized for a slow reaction to the North Korean shelling at Yeonpyeong Nov. 23, which left two South Korean marines and two civilians dead.

Technically, North and South Korea are still at war. Although an armistice has been signed, there has been no peace treaty signed between the two sides since the Korean War of 1950-53, Yonhap said.

In remarks made at his inauguration, the new defense minister said, "We do not want war, but we must never be afraid of it."

"We're in the worst crisis since the Korean War," he said. "Our enemies will keep trying to take advantage of our weaknesses and will plot new provocations."

Measure funds U.S. government for 2 weeks

WASHINGTON, Dec. 4 (UPI) — President Barack Obama signed a continuing resolution Saturday that keeps the federal government running for another two weeks, the White House announced.

House Joint Resolution 101 funds Fiscal Year 2011 appropriations through Dec. 18, giving the lame-duck Congress time to fund operations through next September.

2 killed in Moscow plane crash

MOSCOW, Dec. 4 (UPI) -- Rescue crews report at least two people were killed when a Dagestan Airlines jet went off the runway at Moscow's Domodedovo airport Saturday.

Russia's RIA Novosti news agency said the Tu-154 airliner with 155 people aboard was making an emergency landing after experiencing complete engine failure and skidded off the runway.

The Emergencies Ministry said the flight originated at a different Moscow airport and was en route to Makhachakala in southern Russia when all three of its engines quit.

The cause of the incident was under investigation. There was no immediate word on other injuries.

Drifting ship regains power off Alaska

ANCHORAGE, Alaska, Dec. 4 (UPI) -- A stricken cargo ship with 20 aboard regained limited engine power after being adrift in the stormy waters off Alaska, the U.S. Coast Guard said Saturday.

The Golden Seas was limping away from land and a heavy duty salvage tug was expected to arrive on scene later Saturday to take the 738-foot ship under tow.

Alaska officials told the Anchorage Daily News the crew regained control of the Golden Seas just in time. They feared the ship, which is carrying a cargo of fuel oil and canola seeds, would have run aground on Atka Island by Saturday morning if power had not been restored.

The Coast Guard said in a written statement Friday night that even the weather of Adak had moderated with 29-foot seas settling down to 20 feet.

The Coast Guard cutter Alex Haley was en route to the scene and two helicopters were standing by in the area to offer any rescue assistance, if needed.

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ATTACHMENT G



MSNBC

TRANSCRIPT

Vice President Joe Biden sat down with NBC News Chief Foreign Affairs Correspondent Andrea Mitchell to discuss the current state of the war in Afghanistan, debates over the START Treaty, the tax compromise and Wikileaks. Vice President Biden also offered his heartfelt thoughts on the loss of Richard Holbrooke.

Read the excerpts below:

Biden on the START Treaty and Tax Compromise

VICE PRESIDENT JOE BIDEN: Well, I say let's do the nation's business. Sixty-seven senators voted to move forward on this, including John McCain and Lindsey Graham and the leading voices in the Republican Party.

NBC's ANDREA MITCHELL: But they say they haven't had enough time to study it.

BIDEN: Well, they haven't said that —

MITCHELL: No, I —

BIDEN: They haven't said that.

MITCHELL: — you know, Senator Kyl and the opponents —

BIDEN: Senator Kyl is opposed to the treaty. He is flat opposed to the treaty. So is Senator DeMint opposed to the treaty. Do not let — do not stand in the way of the nation's best interests. Let the Senate vote. Overwhelming, the American people support the START Treaty. Overwhelmingly, the United States Senate supports the START Treaty. It's clearly in our national interests. Every former national security adviser, secretary of Defense, the secretary of State on the Republican Party from George Shultz to Colin Powell thinks it's essential we pass this treaty. Get out of the way. There's too much at stake for America's national security. And don't tell me about Christmas. I understand Christmas. I have been a senator for a long time. I've been there many years where we go right up to Christmas.

There's 10 days between now and Christmas. I hope I don't get in the way of your Christmas shopping, but this is the nation's business. This is the national security that's at stake. Act. Act.

MITCHELL: Does that go for the tax cut, as well?

BIDEN: — that we just acted on.

MITCHELL: But you had a rough session with House Democrats.

BIDEN: Sure, I did.

MITCHELL: They say you sold them out, you sat down with Mitch McConnell and you went in the back room and you cut a deal with the Republicans.

BIDEN: Hey, look, it's true I did — It's true I did negotiate this package. I was in an interview with another network, I will not mention, not long ago. And they said the Senate said you sold them out and it will never pass. I said more than 80 will vote for it. Eighty senators just voted for that deal I allegedly sold them out on.

MITCHELL: Eighty-one.

BIDEN: Eighty.

MITCHELL: Eighty-one.

BIDEN: Well, more than 80. Yes, 80 — 81. The House will, as well. Look, people feel very strongly and I don't blame them. But we cannot afford to go into next year with everyone's taxes going up, the economy threatening to go into a double dip, not growing the economy.

So I had two dictates from the president. Joe, one, make sure whatever you negotiate grows the economy next year. Every major econometric model points out the deal that I was asked to negotiate will increase the growth of the economy from 2.3 to 2.5 to 3.7 to 4. That means tens of thousands, millions of additional jobs.

Secondly, he said to me, Joe, make sure our folks aren't hurt, meaning middle class and working class people. Guess what?

Every one of the tax breaks they had, from college tuition to child care tax credit, which the Republicans opposed, is part of that deal. Every single tax break for middle class Americans has been preserved.

BIDEN: Thirdly, it's for two years. We also have a payroll tax where every person next year will get 2 percent less taken out of their payroll. That's real money. That means well over \$1,000 for the average person out there, additional.

MITCHELL: But the House Democrats, the liberals, they are the people that brought you into power.

BIDEN: Sure they are.

MITCHELL: What are you now saying to them?

BIDEN: Well, I'll tell you, I went in and spoke to them two-and-a-half hours. I'm a creature of the Congress. When I walked in, I got a standing ovation. When I walked out, I got an ovation. All this talk about how there is this overwhelming contention. Not a single one did not thank me. Not a single one said to me that they thought that I sold anybody out. Not a single one said to me that they thought you were going to be able to decouple the upper income tax from the middle class tax cut.

What their argument was is you should have taken more time, Joe. You should have taken more time. The minority who spoke said that. There were a number of people who stood up and said, this is important. Thank you for the deal you negotiated, including progressives and moderates.

MITCHELL: Well, if you were still in the Senate, what about this appropriations bill? All these earmarks and ... Senator McCain was on the floor. He said, you know, you are asleep, to his colleagues, didn't you get the message of the election, people don't want all this pork.

BIDEN: Look, we are in a position where, as the president, we don't get to negotiate this. We set out two parameters. We said we wanted to freeze discretionary spending. It is frozen in this omnibus bill.

Two, we said we need additional funding for national security, additional funding for follow-on in Iraq, so to make sure the civilian side gets ramped up and for dealing with international terrorist organizations. We got both of those things. Do we like some of these, quote, earmarks in there?

No, we don't like them. But the question is, as we go to throw out, you know, the baby with the bath water here?

If, in fact, this omnibus bill negotiated by Republicans and Democrats — not by us — Republicans and Democrats — passes, the president will support it.

Biden on his relationship with Obama and with members of Congress

MITCHELL: And you are the point man on all of this. You're here at the United Nations. You're negotiating with Mitch McConnell. You're everywhere. Are you basically the de facto chief of staff?

BIDEN: Well, look, when the president asked me to join him, he asked what portfolio I wanted. I said I want to be in the room when every decision is being made. You're president, but I want to have an input.

And so the president uses me where I have some skill set. I'm going to say something outrageous. They kid me all the time. I still consider myself a Senate man. I love the Senate. I love the Congress. I keep in touch with them.

So I had great relationships with Republicans as well as Democrats. There's real trust. So it's logical for me, at this point, to be a point man in dealing with the House and the Senate at this time.

I have a significant background — I mean I'm good or bad, but I have a significant background in foreign policy and national security issues. So it's logical that I'd come up here. The president asked me, as you know, because you were one of the first people to interview me when he turned to me and said, Joe, you do Iraq. And the Secretary of Defense and the Secretary of State have cooperated with me. They've followed it with me.

I mean, so it was just logical things that I happened to have some experience, in some cases significant experience. And they just happened to be in the two areas that are being negotiated right now.

On WikiLeaks

BIDEN: I came in, almost all of it was embraces. I mean it wasn't just shaking hands. I know — I know these guys. I know these women. They still trust the United States. There's all kinds of things and —

MITCHELL: So there's no damage?

BIDEN: I don't think there's any damage. I don't think there's any substantive damage, no. Look, some of the cables that are coming out here and around the world are embarrassing. I mean, you know, to say that, you know, for you to do a cable as an ambassador and say I don't like Biden's tie, he doesn't look good and he's a homely guy, that's not something —

MITCHELL: I never said that.

BIDEN: No, I know you didn't. I know you didn't. But yet, I mean, you know, there's — so there's a lot of things like that. But nothing that I am aware of that goes to the essence of the relationship that would allow another nation to say they lied to me, we don't trust them, they really are not dealing fairly with us.

On Iraq

MITCHELL: Iraq — we still have 48,000 troops. Your own son was there. Now another Christmas is coming and they're — they have a government, but there is so much that has not been accomplished.

BIDEN: Well, there's been — think of today. You know this place better than most. Today, the international community said, Iraq, you're back in the family of nations. We think you have a government. We think you are moving in the right direction. We think you're protecting human rights. And we think you're going to be stable.

And so we passed through resolutions here in the Security Council — I had the pleasure of presiding over today — which essentially wiped out the restrictions and the claims against Iraq that were imposed after Saddam Hussein went into Kuwait.

And so this is a reaffirmation that Iraq is back. The international community doesn't think there's so long to go. They know there's more work to be done. But they think they have turned the corner, they have a democracy and they're moving forward.

Biden on Holbrooke

MITCHELL: And, finally, a terrible, terrible loss for all of us, for the country.

BIDEN: Richard Holbrooke.

MITCHELL: Your thoughts on —

BIDEN: I have been —

MITCHELL: — having this Afghanistan —

BIDEN: — friends —

MITCHELL: — review without him.

BIDEN: — with Richard, I was a 29-year-old senator-elect. He was a young, 31-year-old Foreign Service officer in Vietnam. I ran opposed to the war against Vietnam — the — excuse me, the war in Vietnam. We became friends and acquaintances way back then.

He was one of the few figures in American foreign policy who was literally larger than life. And I thought — I wish Kai could have heard when we — when I conducted the Security Council meeting. Almost every single member spoke of him before they made their statements about Iraq. And a number of them spoke from personal terms and it was his heart — from their hearts.

No one, as my grandfather would say, it's a good thing about American democracy, is everyone is expendable, in terms of the — the functioning of this great country. But I'll tell you what, it's going to be a long, long time before anybody is big enough to fill Richard's shoes in every way. He was an outsized personality, an outsized talent. And he contributed more to the peace and security of this country as much as anyone in the last 30 years.

MITCHELL: And we all know there were moments with him. He could be difficult.

BIDEN: He sure could. As a matter of I was with Kati and — at the hospital the day before he died, because I went through a similar kind of event with the aneurisms I had. His was more serious, but they — it was — there was a touch and go piece for me for about three months. And so she was asking me, what was it like and will he remember this. And we were talking.

And we started joking. And I said, you know, he can be a real pain in the you know what. And she laughed like hell. And I was kidding her. I said, thank god you were there for the last 17 years to moderate him and then she told me how he would say the same of me.

But we were friends. This was a guy who was — he had a prodigious intellect. He had a sort of a Kissingerian mind. He saw things globally, strategically, like few other men and women I've dealt with. And he could be very, very tough. But he was my friend.

MITCHELL: Do you have a Christmas message, a holiday message?

BIDEN: Yes. As my grand pop would say, keep the faith. Keep the faith. This country is so strong. It is so big. It is so resilient. Nothing at all can damage its ability to move forward.

A lot of people are hurting. I remember a Christmastime when my dad lost his job and he told us we had to move. It is horrible. But you know what, you know what, we'll come back. And in the meantime, keep in your prayers all those people who are going through really difficult times now.

MITCHELL: And our men and women in —

BIDEN: And, look —

MITCHELL: — combat.

BIDEN: — Jill and to be honest with you, I tried to — I had hoped to spend Christmas in Iraq this year, but it was inappropriate to go while the government was still being formed. And so our thoughts and prayers are with us. We had, for Thanksgiving, we had a number of the young men and women who are amputees over for the holidays. We'll spend Christmas at Walter Reed again.

These are incredible, incredible kids. And to all you — all you moms and dads and sons and daughters who have someone in harm's way now, keep them in your prayers. They'll be home next year.

MITCHELL: Thank you so very much.

BIDEN: Thank you.

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ATTACHMENT H

**ESPIONAGE ACT AND THE LEGAL AND
CONSTITUTIONAL ISSUES RAISED BY WIKILEAKS**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS
SECOND SESSION

DECEMBER 16, 2010

Serial No. 111-160

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

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WASHINGTON : 2011

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JUDY CRU, California	JASON CHAFFETZ, Utah
TED DEUTCH, Florida	TOM ROONEY, Florida
LUIS V. GUTIERREZ, Illinois	GREGG HARPER, Mississippi
TAMMY BALDWIN, Wisconsin	
CHARLES A. GONZALEZ, Texas	
ANTHONY D. WENGER, New York	
ADAM B. SCHIFF, California	
LINDA T. SANCHEZ, California	
DANIEL MAFTEL, New York	
JARED POLIS, Colorado	

PERRY APPELBAUM, *Majority Staff Director and Chief Counsel*
 SEAN MCLEATHLIN, *Minority Chief of Staff and General Counsel*

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ESPIONAGE ACT AND THE LEGAL AND CONSTITUTIONAL ISSUES RAISED BY WIKILEAKS

THURSDAY, DECEMBER 16, 2010

**HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.**

The Committee met, pursuant to notice, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Scott, Jackson Lee, Delahunt, Johnson, Quigley, Gutierrez, Schiff, Sensenbrenner, Coble, Galleghy, Goodlatte, King, Frank, Gohmert, Poe, and Harper.

Staff Present: (Majority) Perry Appelbaum, Staff Director and Chief Counsel; Elliot Minberg, Counsel; Sam Sokol, Counsel; Joe Graupensberger, Counsel; Nafees Syed, Staff Assistant; (Minority) Caroline Lynch, Counsel; Kimani Little, Counsel; and Kelsey Whitlock, Clerk.

Mr. CONYERS. Good morning. The hearing on the Espionage case and the legal and constitutional issues raised by WikiLeaks before the Committee on Judiciary is now about to take place. We welcome everyone here to the hearing. In the *Texas v. Johnson* case in 1989, the Supreme Court set forth one of the fundamental principles of our democracy. That is, that if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

That was Justice William Brennan. Today the Committee will consider the WikiLeaks matter. The case is complicated, obviously. It involves possible questions of national security, and no doubt important subjects of international relations, and war and peace. But fundamentally, the Brennan observation should be instructive.

As an initial matter, there is no doubt that WikiLeaks is in an unpopular position right now. Many feel their publication was offensive. But unpopularity is not a crime, and publishing offensive information isn't either. And the repeated calls from Members of Congress, the government, journalists, and other experts crying out for criminal prosecutions or other extreme measures cause me some consternation.

Indeed, when everyone in this town is joined together calling for someone's head, it is a pretty sure sign that we might want to slow down and take a closer look. And that is why it was so encouraging

to hear the former Office of Legal Counsel, Jack Goldsmith, who served under George W. Bush caution us only last week. And he said, I find myself agreeing with those who think Assange is being unduly vilified. I certainly do not support or like his disclosure of secrets that harm U.S. national security or foreign policy interests. But as all the handwringing over the 1917 Espionage Act shows, it is not obvious what law he has violated.

Our country was founded on the belief that speech is sacrosanct, and that the answer to bad speech is not censorship or prosecution, but more speech. And so whatever one thinks about this controversy, it is clear that prosecuting WikiLeaks would raise the most fundamental questions about freedom of speech about who is a journalist and about what the public can know about the actions of their own government.

Indeed, while there's agreement that sometimes secrecy is necessary, the real problem today is not too little secrecy, but too much secrecy. Recall the Pentagon papers case, Justice Potter Stewart put it, when everything is classified, nothing is classified. Rampant overclassification in the U.S. system means that thousands of soldiers, analysts and intelligence officers need access to huge volumes of purportedly classified material. And that necessary access in turn makes it impossible to effectively protect truly vital secrets.

One of our panelists here today put it perfectly in a recent appearance. He explained, our problem with our security system, and why Bradley Manning can get his hands on all these cables, is we got low fences around a vast prairie because the government classifies just about everything. What we really need are high fences around a small graveyard of what is really sensitive. Furthermore, we are too quick to accept government claims that risk the national security and far too quick to forget the enormous value of some national security leaks. As to the harm caused by these releases most will agree with the Defense Secretary, Bob Gates, his assessment.

Now, I have heard the impact of these releases on our foreign policy described as a meltdown, as a game changer, and so on. I think those descriptions are fairly significantly overwrought. And Mr. Gates continues, is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. policy? I think fairly modest.

So the harm here, according to our Republican Defense Secretary, is fairly modest. Among the other side of the ledger, there is no need to go all the way back to the Pentagon papers to find examples of national security leaks that were critical to stopping government abuses and preserving a healthy democracy. They happen all the time.

In 2005, The New York Times published critical information about widespread domestic surveillance. Ultimately, we learned of a governmental crisis that included threats of mass resignations at the Justice Department and outrageous efforts to coerce a sick attorney general into approving illegal spying over the objections of his deputy and legal counsel's office. If not for this leak, we would have never learned what a civil libertarian John Ashcroft is.

In 2004, the leak of a secret office of legal counsel interrogation memos led to broader revelations of the CIA's brutal enhanced interrogation programs at Black sites. These memos had not been

previously revealed to the Judiciary Committee or to many in Congress. Some feel this harmed national security. But to many Americans, the harm was a secret program of waterboarding and other abuses that might never have been ended but for the leak.

And so we want to, as the one Committee in the Congress that I have a great and high regard for, take a closer look at the issues and consider what, if any, changes in the law might be necessary. And I want to welcome this very distinguished panel. I have read late into the night, and I was awake most of the time when I was reading this, some really great testimony. And I am so glad that you are all here with us. I would like now to recognize my friend and Ranking Member, Judge Louie Gohmert.

Mr. GOHMERT. Thank you, Chairman. And I do appreciate the witnesses here. Before I begin my actual statement, let me just say I appreciate, and am also intrigued by your metaphorical use of the need for high fences around a small graveyard. But I am curious, are you saying this Administration is located in a small graveyard? Is that the point?

Mr. CONYERS. See me after the hearing, please, Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman. And I appreciate the Ranking Member Smith asking me to stand in. But the release last month by WikiLeaks of over 250,000 classified and diplomatic U.S. documents threatens our national security, our relations with foreign governments, and continued candor from embassy officials and foreign sources. Many have applauded the Web site and its founder, Julian Assange, as a hero advocating the continued release of classified and sensitive government documents. But to do so is both naive and dangerous. Web sites such as WikiLeaks and the news publications that reprint these materials claim to promote increased government transparency.

But the real motivation is self-promotion and increased circulation to a large extent. They claim to be in pursuit of uncovering government wrongdoing but dismiss any criticism that their actions may be wrong or damaging to the country. As long as there have been governments, there have been information protected by those governments. There have clearly been documents classified that should not have been classified. While there is legitimate dispute over the extent to which information is protected and classified, it is simply unrealistic to think that the protection of information serves no legitimate purpose.

Much attention has been given to this most recent WikiLeaks release. Many dismiss that any negative repercussions resulted from the leak arguing that the documents, while embarrassing to the U.S., did no real harm to the country. But what about previous leaks by this Web site? On July 25, 2010, WikiLeaks released confidential military field reports on the war in Afghanistan. This site released Iraq war-related documents on October 23, 2010. Both of these leaks reveal sensitive military information that endanger military troops and may have bolstered our enemy's campaigns against us.

Last month's WikiLeaks release has thrust in the spotlight an old, some would even say, arcane statute, the Espionage Act of 1917. It has also resurrected an age-old debate on First Amendment protections afforded to media publications.

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

**RULING: Defense Motion
To Compel #3**

14 September 2012

At issue before the Court is a Defense motion to compel the Government to produce that portion of 1374 emails regarding the accused's confinement at Marine Corps Base Quantico (MCBQ) that has not been disclosed to the Defense. The Government has disclosed approximately 684 of the emails to the Defense. Some of the remaining emails are illegible.

The Government opposes release of the undisclosed emails to the Defense on the grounds that they are not relevant or material to the preparation of the defense because they address (1) public affairs matter, to include discussions of media articles and preparation of responses to media inquiries, including responses to media reports by the New York Times and Frontline; (2) protesters at MCBQ to include discussions of upcoming protests, the number of protestors, and plans to respond to protests; (3) discussions of operational impact on the Pretrial Confinement Facility at MCBQ based on projected detainees, the Defense Base Realignment and Closure Commission (BRAC); (4) providing and funding mental health professionals to include discussions of the extent of each Service's financial obligations; (5) administrative coordination, to include ensuring detainees, including the accused, had the proper uniform; (6) discussion of the accused's "chasers"; (7) discussions of the definitions of MCBQ regulations regarding visits and statements of changes the accused made to his visitation list; (8) editing drafts of proposed documents to include responses to media inquiries; (9) discussions of visits of officials to MCBQ unrelated to the accused; and (10) discussions of complying with the Health Insurance Portability and Accountability Act (HIPAA). The Government has not asserted a privilege regarding the disclosure of the emails.

On 28 August 2012, the Court ordered the Government to produce the undisclosed legible emails to the Court for *in camera* review in accordance with (IAW) RCM 701(g). The Court has conducted an *in camera* review of the undisclosed legible emails and rules as follows

ORDER: No later than **18 September 2012**, the Government shall disclose all of the undisclosed legible emails to the defense except the following emails listed by Bates numbered pages which either refer to subject matter unrelated to U.S. v. Manning or are not material to the preparation of the defense or relevant to the Article 13 motion pending before the Court:

Bates numbers not required to be disclosed:

00063781-2
00063857-9
00065548-54
00065733-4
00067063
00067291-93
00067974-5
00068205
00068433-40
00069557-8
00069565-71
00070654-58

SO ORDERED this 14th day of September in chambers.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Notification
to the Court
for ODNI Files

14 September 2012

In accordance with the Court's Order, dated 1 August 2012, Appellate Exhibit CCXXX, as of 14 September 2012, the United States has provided the defense or made available for inspection by the defense all discoverable files owned by the Office of the Director of National Intelligence (ODNI).



ASHDEN FEIN
MAJ, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 14 September 2012.



ASHDEN FEIN
MAJ, JA
Trial Counsel

UNITED STATES OF AMERICA)

v.)

Prosecution Disclosure
to the Defense

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

14 September 2012

The United States responds to the Court's Order, dated 29 May 2012 as follows:

On 14 September 2012, the United States filed an *ex parte* motion requesting the Court consider the motion *in camera* and *ex parte* under MRE 505(g)(2) and to authorize redactions of portions of Department of State documents that are neither favorable to the accused and material to guilt or punishment, relevant and necessary for production under RCM 703(f), subject to production under the Court's Order dated 19 July 2012, nor "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). The United States seeks to protect foreign government information and foreign relations or foreign activities of the United States.

On 14 September 2012, the United States filed an *ex parte* motion requesting the Court consider the motion *in camera* and *ex parte* under MRE 505(g)(2) and to authorize a summary of information contained within Central Intelligence Agency (CIA) documents that is favorable to the accused and material to guilt or punishment. See Enclosure. The United States seeks to protect information relating to intelligence sources, methods, and activities, all within the national security interests of the United States.


ASHDEN FEIN
MAJ, JA
Trial Counsel

Enclosure

Government *ex parte* Motion (CIA) [unclassified redacted version]

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Government *in camera* Motion for
Authorization of a Summary of
CIA Information
under MRE 505(g)(2)

14 September 2012

RELIEF SOUGHT

(U) COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2); and (2) authorize a summary of information contained within Central Intelligence Agency (CIA) documents under Military Rule of Evidence (MRE) 505(g)(2) that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under Rule for Courts-Martial (RCM) 703(f).

BURDEN OF PERSUASION AND BURDEN OF PROOF

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

(U) On 25 July 2012, the Government requested leave of the Court until 14 September 2012 to disclose, either to the defense or to the Court under MRE 505(g)(2), potentially discoverable records owned by the CIA which were not subject to the Court's 22 June 2012 order. See AE CCXXVI. On 26 July 2012, the Court ordered the prosecution to file a supplemental pleading stating, with particularity, the approval procedures required prior to disclosure of information above the "Secret" level. See Email from Court, dated 26 July 2012.

(U) On 31 July 2012, the Government filed the supplemental pleading. See AE CCXXV. On 1 August 2012, the Government's request for leave until 14 September 2012 was granted. See AE CCXXX.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U) [REDACTED] may be contacted at [REDACTED] or [REDACTED]

[REDACTED]

[REDACTED]

(U) The CIA gives temporary custody of the summary to the prosecution. The prosecution is authorized to make the summary available to the defense counsel and their security experts to inspect until the end of the court-martial. The defense counsel are only authorized access to inspect the summary with their security experts present. The defense counsel and their experts are authorized to take notes, and those notes will be classified at the same level as the summary. All notes must be stored pursuant to the Court's Protective Order, dated 16 March 2012. The defense counsel and their experts are not authorized to share the information contained within the summary or their notes with the accused. At the conclusion of the court-martial, the prosecution is required to return all the copies of the summary to the CIA.

WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the enclosures listed at the end of this motion.

LEGAL AUTHORITY AND ARGUMENT

(U) If classified information is at issue in a court-martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

(U) The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the CIA, through the prosecution, is voluntarily disclosing a summary of the documents and is not withholding any classified information under MRE 505(c) and MRE 505(i).

[REDACTED]

(U) The information contained within the original documents, which is not included in the summary, does not meet the Brady/Giglio, RCM 701(a)(6), or RCM 703(f) standards and therefore is not discoverable or subject to production. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the other information in the documents.

(U) Should the Court find the deleted, substituted, or summarized information is discoverable under RCM 701(a)(6) or Brady/Giglio, subject to production under RCM 703(f), or "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the United States requests the opportunity to either (1) address the Court's findings with the relevant government agency to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the United States to move for an *in camera* proceeding under MRE 505(i).

(U) The United States will not use any portion of these CIA documents not disclosed to the defense during any portion of the trial. This includes rebuttal and rule of completeness if the defense introduces or references anything in the substitution.


[REDACTED]

[REDACTED]

[REDACTED]

CONCLUSION

(U) The United States respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize a summary of information contained within CIA documents that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under RCM 703(f).


JODEAN MORROW
CPT, JA
Assistant Trial Counsel

3 Enclosures

1. Original CIA Documents on file at the CIA (variously classified) [not attached]

[REDACTED]

[REDACTED]

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Government *ex parte* Motion for
Authorization of a Redaction of
Material within One Department of
Homeland Security Document under
RCM 701(g)(2)

14 September 2012

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under Rule for Courts Martial (RCM) 701(g)(2); and (2) authorize a redaction of material within one Department of Homeland Security (DHS) document under RCM 701(g)(2) that is neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the prosecution has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. See RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. See RCM 905(c)(1).

FACTS

On 25 July 2012, the prosecution requested leave of the Court until 14 September 2012 to complete its search of DHS records and to disclose any DHS records which contain discoverable material. See Appellate Exhibit (AE) CCXXVI.

On 26 July 2012, the Court ordered the prosecution to file a supplemental pleading stating with particularity the efforts required to obtain the requested information. The prosecution filed its supplement on 31 July 2012. See AE CCXXVIII.

On 1 August 2012, the Court granted the prosecution's request for leave until 14 September 2012 to search for, and disclose, any discoverable DHS documents to the defense or to the Court under RCM 701(g)(2) or MRE 505(g)(2). See AE CCXXX.

On 14 September 2012, the prosecution disclosed 44 documents owned by DHS.

As of 14 September 2012, the prosecution has provided the defense, or made available for inspection by the defense, all discoverable documents owned by DHS, except for the one document that is the subject of this motion.



WITNESSES/EVIDENCE

The prosecution does not request any witnesses or evidence be produced for this motion. The prosecution requests that the Court consider the enclosure listed at the end of this motion.

LEGAL AUTHORITY AND ARGUMENT

RCM 701(g)(2) states that "[u]pon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." RCM 701(g)(2). The rule continues that "[u]pon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge." *Id.*; see also AE XXX ("RCM 701(g)(2) does authorize the Court to allow *ex parte* showings by either party when moving the Court to restrict or limit discovery"); United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999) (under RCM 701(g)(2), "the military judge has such tools as *in camera* reviews, and protective or modifying orders at his disposal").


The proposed redacted information is neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production. See Brady v. Maryland, 373 U.S. 83 (1963); RCM 701(a)(6); RCM 703(f).

The proposed redaction is shaded in grey on the enclosed document. See Enclosure. Though unclassified, the redaction is necessary 


The prosecution will not use the redacted information during any portion of the trial.

CONCLUSION

The prosecution respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under RCM 701(g)(2); and (2) authorize a redaction of material within one DHS document under RCM 701(g)(2) that is neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f).


J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

Enclosure
Department of Homeland Security Document

Appellate Exhibit 321
2 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 321
Enclosure 1
2 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 322

4 pages

classified

"SECRET"

ordered sealed for Reason 2
and Reason 7 (government)

Military Judge's Seal Order
dated 20 August 2013

stored in the classified
supplement to the original
Record of Trial

Appellate Exhibit 322

Enclosure 1

classified

"TOP SECRET"

ordered sealed for Reason 1

and Reason 7 (government)

Military Judge's Seal Order

dated 20 August 2013

is stored at the Office of the

General Counsel, Central

Intelligence Agency pursuant

to AE 500

Appellate Exhibit 322

Enclosure 2

2 pages

classified

"SECRET"

ordered sealed for Reason 2
and Reason 7 (government)

Military Judge's Seal Order
dated 20 August 2013

stored in the classified
supplement to the original
Record of Trial

Appellate Exhibit 322

Enclosure 3

12 pages

classified

"SECRET"

ordered sealed for Reason 2
and Reason 7 (government)

Military Judge's Seal Order

dated 20 August 2013

stored in the classified
supplement to the original
Record of Trial

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Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

**Government in camera Motion for
Authorization of a Summary of
CIA Information
under MRE 505(g)(2)**

14 September 2012

(U) COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2); and (2) authorize a summary of information contained within Central Intelligence Agency (CIA) documents under Military Rule of Evidence (MRE) 505(g)(2) that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under Rule for Courts-Martial (RCM) 703(f).

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

(U) On 25 July 2012, the Government requested leave of the Court until 14 September 2012 to disclose, either to the defense or to the Court under MRE 505(g)(2), potentially discoverable records owned by the CIA which were not subject to the Court's 22 June 2012 order. See AE CCXXVI. On 26 July 2012, the Court ordered the prosecution to file a supplemental pleading stating, with particularity, the approval procedures required prior to disclosure of information above the "Secret" level. See Email from Court, dated 26 July 2012.

(U) On 31 July 2012, the Government filed the supplemental pleading. See AE CCXXV. On 1 August 2012, the Government's request for leave until 14 September 2012 was granted. See AE CCXXX.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U) [REDACTED] may be contacted at [REDACTED] or [REDACTED]

[REDACTED]

[REDACTED]

(U) The CIA gives temporary custody of the summary to the prosecution. The prosecution is authorized to make the summary available to the defense counsel and their security experts to inspect until the end of the court-martial. The defense counsel are only authorized access to inspect the summary with their security experts present. The defense counsel and their experts are authorized to take notes, and those notes will be classified at the same level as the summary. All notes must be stored pursuant to the Court's Protective Order, dated 16 March 2012. The defense counsel and their experts are not authorized to share the information contained within the summary or their notes with the accused. At the conclusion of the court-martial, the prosecution is required to return all the copies of the summary to the CIA.

WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the enclosures listed at the end of this motion.

LEGAL AUTHORITY AND ARGUMENT

(U) If classified information is at issue in a court-martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

(U) The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the CIA, through the prosecution, is voluntarily disclosing a summary of the documents and is not withholding any classified information under MRE 505(c) and MRE 505(i).

[REDACTED]

(U) The information contained within the original documents, which is not included in the summary, does not meet the Brady/Giglio, RCM 701(a)(6), or RCM 703(f) standards and therefore is not discoverable or subject to production. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the other information in the documents.

(U) Should the Court find the deleted, substituted, or summarized information is discoverable under RCM 701(a)(6) or Brady/Giglio, subject to production under RCM 703(f), or "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the United States requests the opportunity to either (1) address the Court's findings with the relevant government agency to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the United States to move for an *in camera* proceeding under MRE 505(i).

(U) The United States will not use any portion of these CIA documents not disclosed to the defense during any portion of the trial. This includes rebuttal and rule of completeness if the defense introduces or references anything in the substitution.

[REDACTED]

[REDACTED]

[REDACTED]

CONCLUSION

(U) The United States respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize a summary of information contained within CIA documents that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under RCM 703(f).


JODEAN MORROW
CPT. JA
Assistant Trial Counsel

3 Enclosures

1. Original CIA Documents on file at the CIA (variously classified) [not attached]
- [REDACTED]
- [REDACTED]

Appellate Exhibit 324
2 pages
ordered sealed for Reason 7
(government)
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 324

Enclosure 1

76 pages

classified

"SECRET"

ordered sealed for Reason 2
and Reason 7 (government)

Military Judge's Seal Order

dated 20 August 2013

stored in the classified
supplement to the original
Record of Trial

Appellate Exhibit 324

Enclosure 2

1 CD

classified

"SECRET"

ordered sealed for Reason 2
and Reason 7 (government)

Military Judge's Seal Order
dated 20 August 2013

stored in the classified
supplement to the original
Record of Trial

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Notification
to the Court
for Quantico Emails

18 September 2012

In accordance with the Court's Order, dated 18 September 2012, the United States disclosed all of the undisclosed legible emails to the defense except the emails listed by "Bates" numbered pages referenced in the Court's Order. Although the Court referenced "Bates" numbers in its Order, the numbers actually provided to the Court were sequential administrative control numbers for the Court to reference during its *in camera* review and not discovery production Bates numbers. Each page of emails produced pursuant to the Order, was provided a unique Bates number, in the standard format used in this case, for the defense to reference.


ASHDEN FEIN
MAJ, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 18 September 2012.


ASHDEN FEIN
MAJ, JA
Trial Counsel

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, [REDACTED])

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**MOTION TO DISMISS ALL
CHARGES AND
SPECIFICATIONS WITH
PREJUDICE FOR LACK OF A
SPEEDY TRIAL**

DATED: 19 September 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by counsel, pursuant to the Sixth Amendment to the United States Constitution, Article 10, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810, Rule for Courts Martial (R.C.M.) 707(a), (d)(1), and applicable case law, requests this Court to dismiss all charges and specifications with prejudice for lack of a speedy trial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Government bears the burden of persuasion on a motion to dismiss for denial of the right to speedy trial under R.C.M. 707. R.C.M. 905(c)(2)(B). Additionally, the Government bears the burden of persuasion on a motion to dismiss for denial of the right to speedy trial under Article 10. See *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005) ("Under Article 10, the Government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss." (citing *United States v. Brown*, 28 C.M.R. 64, 69 (C.M.A. 1959))); *United States v. Calloway*, 47 M.J. 782, 785 (N-M. Ct. Crim. App. 1998) ("[W]hen the defense raises a motion to dismiss for lack of speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, the prosecution has the burden of proof to establish that such immediate steps were taken."); *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim. App. 1994) ("[I]t is our conclusion that RCM 905(c)(2)(B) places the burden of proof on the prosecution whenever the defense moves to dismiss for lack of speedy trial, whether the motion is framed under the terms of Article 10 or RCM 707."). Therefore, the Government bears the burden of persuasion on all aspects of this motion. The burden of proof on any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS¹

¹ In addition to this statement of facts, the Defense has also prepared a chronology detailing the processing of the case, as suggested by R.C.M. 707(c)(2). See Attachment 1.

3. As of the date of this motion, PFC Manning has been in pretrial confinement for 845 days. Eight hundred forty-five days. Two days after the Government placed PFC Manning in administrative hold with escorts on 27 May 2010, PFC Manning was placed into pretrial confinement. *See* Confinement Order, Attachment 2. He has remained in pretrial confinement ever since. With trial scheduled to commence on 4 February 2013, PFC Manning will have spent a grand total of 983 days in pretrial confinement before even a single piece of evidence is offered against him. To put this amount of time into perspective, the Empire State Building could have been constructed almost two-and-a-half times over in the amount of time it will have taken to bring PFC Manning to trial.²

4. The processing of this case has been marred with prosecutorial incompetence and a profound lack of Government diligence. The combination has led to an abject failure of the Government to honor PFC Manning's fundamental speedy trial rights. Since the date of arraignment is a significant date in the R.C.M. 707 speedy trial analysis, *see* R.C.M. 707(b)(1) (providing that the R.C.M. 707 speedy trial clock terminates when the accused is arraigned), the discussion of the facts of this case will be divided into pre-arraignment delay and post-arraignment delay.

A. Pre-Arraignment Delay

1. R.C.M. 706 Board

5. The Government preferred the original charges against PFC Manning on 5 July 2010. The next day, COL David M. Miller appointed LTC Craig Merutka to be the Article 32 Investigating Officer (IO). *See* Merutka Appointment Memorandum, Attachment 3. On 11 July 2010, the Defense moved for a delay of the Article 32, UCMJ, 10 U.S.C. § 832, hearing in order to conduct an R.C.M. 706 board. *See* 11 July 2010 Defense Request, Attachment 4. After this initial request was denied, the Defense renewed its request for delay a day later. *See* 12 July 2010 Defense Request, Attachment 5. This request was granted. When no further action was taken, the Defense yet again renewed its request for a R.C.M. 706 board on 18 July 2010. *See* 18 July 2010 Defense Request, Attachment 6 (stating in the first paragraph "[t]o date, the Defense has not been notified as to whether that request [request from 11 and 12 July] has been approved or denied.").

6. On 29 July 2010, the Government transferred PFC Manning to the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF) in Quantico, Virginia. *See* Appellate Exhibit 258 at 4. The PCF Commander, CWO4 James Averhart, approved of the Duty Brig Supervisor's Maximum (MAX) custody determination and also decided that PFC Manning should be placed under special handling instructions of Suicide Risk (SR). *Id.* Despite the recommendations of two senior forensic psychologists (and contrary to the requirements of Secretary of Navy Instruction (SECNAVINST) 1640.9C), the Brig did not immediately remove PFC Manning from Suicide Risk, waiting almost a full week to move PFC Manning from Suicide Risk to Prevention of Injury (POI) status on 11 August 2011. *Id.* at 4-5. For the next 8 months, PFC Manning remained in MAX custody and POI status, despite the recommendations

² The Empire State Building took one year and 45 days to build. *See* <http://history1900s.about.com/od/1930s/a/empirefacts.htm>.

of multiple psychiatrists that he be downgraded from POI status. *Id.* at 8, 11. The severely onerous conditions of life under MAX custody and POI status were detailed extensively in the Defense Article 13 Motion. *See id.* at 8-11. As if life at Quantico was not difficult enough for PFC Manning under MAX custody and POI status, he was placed on Suicide Watch on two separate occasions: from 18 January 2011 to 21 January 2011 and from 2 March 2011 until the time he was transferred to the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, Kansas on 20 April 2011. *See id.* at 27, 35-36. During each stint on Suicide Watch, the Brig forced PFC Manning to, among other things: strip down to his underwear during the day; sleep naked each night; surrender his eyeglasses; and remain in his 6'x8' cell. *See id.* at 27-37. The severity of PFC Manning's treatment at the hands of the Quantico Brig sparked intense criticism, both domestically and internationally. *See id.* at 38-41.

7. Meanwhile, on 4 August 2010, the Convening Authority, COL Carl R. Coffman, Jr., appointed LTC Paul Almanza as the new IO. *See* Almanza Appointment Memorandum, Attachment 7. This memorandum provided LTC Almanza with the authority to exclude reasonable periods of delay under R.C.M. 707 but directed that all approvals or denials of delay requests must be in writing. *Id.* at 1. Further, the memorandum stated that the Convening Authority must approve all delays in excess of ten days. *Id.*

8. One week later, as the Government had still made little to no progress on the three prior Defense requests for a R.C.M. 706 board, the Defense yet again requested a delay in the Article 32 hearing for the completion of the R.C.M. 706 board. *See* 11 August 2010 Defense Request, Attachment 8. The Convening Authority approved the requested delay on 12 August 2010, ordering that "the period from 11 August 2010 until the R.C.M.706 Sanity Board completion is excludable defense delay." *See* 12 August 2010 Excludable Delay Memorandum, Attachment 9.

9. On 25 August 2010, the Defense requested that the R.C.M. 706 board be delayed until a forensic psychiatrist was appointed to the Defense team. *See* 25 August 2010 Defense Request, Attachment 10. That same day, the Convening Authority approved the request, stating that "[t]he period between 27 August 2010 and until the GCMA takes action on the defense request is excludable delay under R.C.M. 707(c)." *See* 25 August 2010 Excludable Delay Memorandum, Attachment 11.

10. The next day, the Defense requested delay of the R.C.M. 706 board until procedures were adopted to safeguard any classified information discussed in the board's determination. *See* 26 August 2010 Defense Request, Attachment 12. On 3 September 2010, the Defense requested appropriate security clearances for the Defense team and access for PFC Manning. *See* 3 September 2010 Defense Request, Attachment 13. The Convening Authority ultimately issued its preliminary classification order on 22 September 2010. *See* 22 September 2010 Preliminary Classification Review Order, Attachment 14. The Defense responded to this order on 28 September 2010. *See* 28 September 2010 Defense Response to Preliminary Classification Review Order, Attachment 15.

11. On 12 October 2010, the Convening Authority began its monthly practice of issuing an excludable delay memorandum. In the 12 October 2010 memorandum, the Convening Authority stated that "[t]he period from 12 July 2010 until the date of this memorandum is excludable

delay under RCM 707(c).” See 12 October 2010 Excludable Delay Memorandum, Attachment 16. For the basis of this period of excludable delay, the Convening Authority identified the following: the Original Classification Authorities’ (OCA) reviews of classified information; the Defense Requests of 11 July 2010, 18 July 2010, 25 August 2010, 26 August 2010, 3 September 2010; the Preliminary Classification Review Order; and the Defense Response to the Preliminary Classification Review Order. See *id.*

12. A little less than a month later, the Convening Authority excluded the period from 12 October 2010 to 10 November 2010 as excludable delay under R.C.M. 707(c). See 10 November 2010 Excludable Delay Memorandum, Attachment 17. The Convening Authority listed the same defense requests and responses that were listed in the 12 October 2010 Excludable Delay Memorandum as the basis for the most recent period of excluded delay. See *id.*

13. On 13 December 2010, the Defense security experts completed their preliminary classification review and provided the required written responses to the questions posed by the Convening Authority’s Preliminary Classification Review Order. See 13 December 2010 Memorandum of Defense Security Experts, Attachment 18.

14. The Convening Authority issued another excludable delay memorandum on 17 December 2010, this time excluding the period from 10 November 2010 to 17 December 2010 under R.C.M. 707(c). See 17 December 2010 Excludable Delay Memorandum, Attachment 19. For the basis of its finding of excludable delay, the Convening Authority identified the OCA reviews of classified information, and the Defense requests of 11 July 2010, 18 July 2010, 26 August 2010, and 3 September 2010. See *id.*

15. On 13 January 2011, the Defense made a speedy trial request, pursuant to the guarantees of the Sixth Amendment to the United States Constitution, Article 10, and R.C.M. 707. See 13 January 2011 Defense Speedy Trial Request, Attachment 20.

16. The next day, the Convening Authority issued another excludable delay memorandum, stating that “[t]he period from 17 December 2010 until the date of this memorandum [14 January 2011] is excludable delay under RCM 707(c).” See 14 January 2011 Excludable Delay Memorandum, Attachment 21. The memorandum set forth the exact same basis for delay that was set forth in the 17 December 2010 Excludable Delay Memorandum. See *id.* The Convening Authority acknowledged the Defense’s speedy trial request from the day before. See *id.*

17. On 3 February 2011, the Convening Authority issued an order directing the R.C.M. 706 board to resume its examination into the mental capacity and mental responsibility of PFC Manning. See 3 February 2011 Order to Resume Conducting Sanity Board, Attachment 22, at 1. The order set a suspense date of 3 March 2011, four weeks from the date of the order. See *id.* at 6.

18. About two weeks later, on 15 February 2011, the Convening Authority issued another excludable delay memorandum, excluding the period from 14 January 2011 to 15 February 2011 as excludable delay under R.C.M. 707(c). See 15 February 2011 Excludable Delay

Memorandum, Attachment 23. The Convening Authority identified the same bases for delay in its February memorandum as it had identified in its December and January memoranda. *See id.* No new bases or reasons for delay were identified. *See id.* The Convening Authority also acknowledged the Defense's 13 January 2011 speedy trial request. *See id.*

19. On 14 March 2011, almost two weeks after the suspense date set forth in the Convening Authority's 3 February 2011 order to resume conducting the R.C.M. 706 sanity board, Dr. Michael Sweda, Chief Forensic Psychologist, sought an extension of the suspense date for the R.C.M. 706 board until 29 April 2011. *See* 14 March 2011 Memorandum Requesting Extension for R.C.M. 706 Board, Attachment 24. In this memorandum, Dr. Sweda related that the R.C.M. 706 board needed 57 more days than the original suspense date of 3 March 2011 because "[t]he evaluators are coordinating suitable dates and times for the final evaluation session to take place. This involves multiple parties. Additionally, the final interview will take place at a SCIF and this has resulted in the consumption of extra time for this aspect of the evaluation to be coordinated." *Id.* Four days later, the Convening Authority approved the R.C.M. 706 Board's request for delay, but set a suspense date of 16 April 2011 instead of the 29 April 2011 suspense date requested by Dr. Sweda. *See* 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25.

20. That same day, 18 March 2011, the Convening Authority issued another excludable delay memorandum. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26. Acknowledging the Defense's 13 January 2011 speedy trial request, the Convening Authority excluded the period from 15 February 2011 to 18 March 2011 as excludable delay under R.C.M. 707(c). *See id.* For the basis of this delay, the Convening Authority identified the same bases that were articulated in the December, January, and February excludable delay memoranda. *See id.* Two other bases were also identified in the March excludable delay memorandum: OCA consent to disclose classified information and the R.C.M. 706 Board's extension request. *See id.*

21. On 15 April 2011, the day before the extended suspense date for the completion of the R.C.M. 706 Board's evaluation, Dr. Sweda, on behalf of the Board, requested yet another delay in the suspense date. *See* 15 April 2011 Memorandum Requesting Extension for Sanity Board, Attachment 27. Dr. Sweda requested an extended suspense date of close of business on 22 April 2011. *See id.* Dr. Sweda explained that this delay was necessary because of the Board's "limited availability to meet as a full board to discuss the report. This is because of conflicting schedules and demands of the three board members." *Id.* The Convening Authority approved, without Defense input, Dr. Sweda's request later that same day. *Id.* While the three board members were coordinating their schedules, PFC Manning remained confined at Quantico, enduring the severely onerous confinement conditions, which included being held in MAX Custody, in POI Status, being stripping naked at night and wearing a suicide smock. *See* Appellate Exhibit 258, at 35-37.

22. On 22 April 2011, the R.C.M. 706 Board submitted its final report. *See* 22 April 2011 Sanity Board Evaluation of Bradley E. Manning, Attachment 28. That same day, the Convening Authority issued another excludable delay memorandum excluding the period from 18 March 2011 until 22 April 2011 as excludable delay under R.C.M. 707(c). *See* 22 April 2011 Excludable Delay Memorandum, Attachment 29. This memorandum identified the exact same

bases for the delay as were identified in the 18 March 2011 excludable delay memorandum, as well as the second extension request by the R.C.M. 706 Board. *See id.* The memorandum acknowledged the Defense's 13 January 2011 speedy trial request. *See id.* This memorandum was signed for the Convening Authority by SFC Monica Carlile, a paralegal for the Government. *See id.*

2. Government Requests for Delay

23. On 25 April 2011, the Government submitted the first of many requests for delay of the Article 32 hearing. *See* 25 April 2011 Government Request for Delay, Attachment 30. The Government requested delay until

[t]he United States receives consent from all the Original Classification Authorities (OCAs) to release discoverable classified evidence and information to the defense. This consent is necessary in order for the United States to fulfill its discovery obligations under Article 46, UCMJ and the Rules for Courts-Martial (RCM), as well as for the defense to adequately prepare for the Article 32 Investigation.

Id. The Government represented that "[s]ince 17 June 2010, the United States has been diligently working with all of the departments and agencies that originally classified the information and evidence sought to be disclosed to the defense and the accused." *Id.* The delay requested was "until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews or 25 May 2011." *Id.*

24. The Defense opposed this delay the next day, 26 April 2011. *See* 26 April 2011 Defense Response to Government Request for Delay, Attachment 31. In order to minimize any further delay, the Defense requested that the Government: provide substitutes for or summaries of the relevant classified documents; allow the Defense to inspect all unclassified documents within the Government's control that were material to the preparation of the Defense; and ensure that the Defense has equal access to CID and other law enforcement witnesses by making available any requested witnesses. *Id.* at 1. The Defense also renewed its previous request for discovery that was either denied or not provided by the Government. *Id.* Finally, the Defense requested that any further delay be credited to the Government. *Id.* at 2.

25. On 12 May 2011, the Convening Authority issued another excludable delay memorandum, stating that "[t]he period from 22 April 2011 until the date of this memorandum is excludable delay under RCM 707(c)." *See* 12 May 2011 Excludable Delay Memorandum, Attachment 32. The memorandum listed the following as the basis for the delay: OCA reviews of classified information; OCA consent to disclose information; the Defense's 26 August 2010 request for the results of the Government's classification reviews by the OCAs; the Defense's 3 September 2010 request for appropriate security clearances for the Defense team and access for PFC Manning; and the Government's 25 April 2011 request for delay. *See id.* The Convening Authority acknowledged the Defense's 13 January 2011 speedy trial request. *See id.*

26. On 22 May 2011, the Government submitted its second request for delay of the Article 32 hearing, relating once again that delay was necessary in order to obtain consent from the OCAs. See 22 May 2011 Government Request for Delay, Attachment 33. In the "Update" section of its request, the Government represented that it was "continuing" to work with the OCAs to obtain the necessary consent to disclosed classified information and evidence to the Defense. *Id.* The Government requested delay until the earlier of the completion of the OCA disclosure requests and classification reviews or 27 June 2011. See *id.* The Government promised an update no later than 25 June 2011. *Id.*

27. Two days later, the Defense sent an email opposition to the Government's request for delay. See 24 May 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 34. The Defense relied on its position from the 26 April 2011 memorandum opposing the Government's first request for delay. *Id.* The Defense also requested that any additional delay be credited to the Government. *Id.*

28. Nevertheless, on 17 June 2011, the Convening Authority excluded the period from 12 May 2011 to 17 June 2011 as excludable delay under R.C.M. 707(c). See 17 June 2011 Excludable Delay Memorandum, Attachment 35. The "basis" for this exclusion was the exact same basis identified in the Convening Authority's May excludable delay memorandum, except now the Government's 22 May 2011 request for delay replaced the 25 April 2011 request for delay that had been listed in the 12 May 2011 excludable delay memorandum. See *id.* Finally, at the conclusion of the memorandum, the Convening Authority repeated, with no elaboration whatsoever, the line that it had repeated ad nauseam in every excludable delay memorandum since 13 January 2011: "I acknowledge and reviewed the defense request for speedy trial, dated 13 January 2011." *Id.*

29. On 27 June 2011, two days after its self-imposed update deadline, the Government yet again requested delay of the Article 32 hearing – its third such request in as many months. See 27 June 2011 Government Request for Delay, Attachment 36. This request, like the other two before it, requested delay "until the United States receives the proper authority to release discoverable unclassified and classified evidence and information to the defense." *Id.* at 1. The Government once again represented that it was "continuing" to work with the OCAs. *Id.* The Government therefore requested delay until the earlier of the completion of the OCA classification review process or 27 July 2011. *Id.* at 2. Two days later, the Defense opposed the Government's request for delay via email, maintaining the position articulated in its 26 April 2011 memorandum opposing the Government's first request for delay. See 29 June 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 37. The Defense again requested that any additional delay be credited to the Government. *Id.*

30. On 5 July 2011, the Convening Authority approved the Government's latest request for delay. See 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The Convening Authority then purported to exclude the period from 22 April 2011 to the restart of the Article 32 hearing as excludable delay under R.C.M. 707(c). *Id.* Based on the "national security concerns and ongoing investigations" in this case, the Convening Authority directed the Government to "cautiously proceed with the disclosure of information[.]" *Id.* However, the Convening Authority also ordered the Government to "expeditiously" disclose

information to the Defense once it received the authority to disclose the information in order to “minimize any unnecessary delay.” *Id.*

31. To no one’s surprise, the Government requested delay of the Article 32 hearing for the fourth time in as many months on 25 July 2011. *See* 25 July 2011 Government Request for Delay, Attachment 39. The basis of this request was exactly the same as all of the previous requests: the Government still needed time to get the approvals of the various OCAs to release information to the defense. *See id.* at 1. The Government once again presented its patented get-out-of-diligence-free card by representing that it was still “continuing” to work with the relevant OCAs. *Id.* In order to create the illusion of progress, the Government represented that it had “produced the Secretary of the Army AR 15-6 and related documents, as well as the complete record of the MSG Adkins reduction board – approximately 10,000 pages of documents in total.” *Id.* Of course, the Government neglected to mention that most of these 10,000 pages were irrelevant, duplicative, or both. The Government requested that the Article 32 hearing be delayed until the earlier of the completion of the OCA classification review process or 27 August 2011. *Id.* at 2.

32. Later that same day, the Defense opposed the Government’s request for delay. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. While acknowledging that classification reviews do take some time to complete, the Defense pointed out that “the Government has now had over a year” to complete the classification review process. *Id.* The opposition memorandum also attacked the adequacy of the Government’s explanation of why such protracted delay was necessary: “The latest request by the trial counsel for excludable delay does not adequately explain what has been done to require timely response and reviews by the relevant OCAs.” *Id.* In this memorandum, the Defense also renewed its requests for speedy trial and for the Government to: provide a substitute for a summary of the relevant classified documents; to allow the Defense to inspect all unclassified documents, tangible items, and reports within the Government’s control; provide previously denied or withheld discovery; and provide access to all CID and other law enforcement agents who have worked on the case. *Id.* The Defense once again requested that any additional delay be credited to the Government instead of being excluded under R.C.M. 707(c). *Id.*

33. The Convening Authority nevertheless approved the Government’s fourth request for delay the next day. *See* 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41. Appearing to merely change the dates listed in the 5 July 2011 memorandum approving the Government’s third request for delay, the 26 July 2011 memorandum excluded under R.C.M. 707(c) the period between 22 April 2011 and the restart of the Article 32. *See id.* The Convening Authority did not respond to the Defense’s concerns regarding the Government’s wholly inadequate explanation of why more delay was necessary. *See id.* Moreover, the Convening Authority’s memorandum did not even acknowledge the Defense’s request for speedy trial. *See id.*

34. On 10 August 2011, the Convening Authority issued another excludable delay memorandum. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. This memorandum stated that “[t]he period from 13 July 2011 until [10 August 2011] is excludable delay under RCM 707(c).” *Id.* The Convening Authority relied on the exact same bases for

delay as it had relied on in the excludable delay memoranda of 12 May 2011 and 17 June 2011. *See id.* Namely, the Convening Authority identified the following as providing the basis for the delay: OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for the results of the Government's classification reviews; and the 3 September 2010 Defense request for appropriate security clearances for the defense team. *See id.*; 17 June 2011 Excludable Delay Memorandum, Attachment 35 (identifying these exact same bases for delay); 12 May 2011 Excludable Delay Memorandum, Attachment 32 (same). The only difference in the basis for the delay of the 10 August 2011 excludable delay memorandum and the two prior excludable delay memoranda is that the Government's fourth request for delay was substituted for the earlier requests for delay that were identified in the May and June excludable delay memoranda. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. The Convening Authority gave no explanation of the reasons that justified granting yet another delay based on the same Government argument that had been repeated every month since April 2011. Additionally, the Convening Authority did not even attempt to address the Defense's argument raised in the 25 July 2011 opposition memorandum that the Government had had over a year to complete the classification review process and had still not managed to get its affairs in order. At the end of the excludable delay memorandum, the Convening Authority acknowledged the Defense's 13 January 2011 speedy trial request and 25 July 2011 renewed speedy trial request. *Id.*

35. The Government made its fifth request for delay of the Article 32 hearing on 25 August 2011. *See* 25 August 2011 Government Request for Delay, Attachment 43. The basis for the requested delay was the same as before: the Government still, over a year and two months after PFC Manning was placed into pretrial confinement, needed time to obtain the authority from the OCAs to disclose evidence and information to the Defense. *See id.* at 1. The Government once again represented that it was "continuing" to work with the OCAs without providing any detail on where the classification review process stood and why it still remained incomplete after more than a year. *See id.* While the Government was quick to point out that it had already disclosed over 20,000 pages of documents to the defense, *see id.* at 2, it omitted the fact that most of these documents were irrelevant, duplicative or both. The Government asserted in conclusory fashion that it had "actively and diligently worked to resolve all outstanding issues to ensure the timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired." *Id.* However, the Government chose to not respond to the Defense's concerns identified in the 25 July 2011 opposition memorandum that the Government had still not completed its classification review process after over a year after the charges had been preferred and that the Government had provided a patently inadequate explanation for its numerous requests for delay.

36. Two days later, the Defense opposed the Government's request for delay, reiterating its position that any additional delay should not be excluded under R.C.M. 707(c) but should rather be credited to the Government for speedy trial purposes. *See* 27 August 2011 Email from Mr. Coombs to COL Coffman Opposing the Government's Request for Delay, Attachment 44.

37. On 29 August 2011, the Convening Authority approved the Government's fifth request for delay of the Article 32. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. The memorandum stated that "[t]he period between 22 April 2012 and

the restart of the Article 32 Investigation is excludable delay under RCM 707(c). The prosecution is required to provide me an update no later than 23 September 2011.” *Id.* This memorandum was quite plainly a cut-and-paste job, identical to the 5 July 2011 and 26 July 2011 approval memoranda in all respects save the updated dates. *See id.*; 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41; 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. Like the prior memoranda, the 29 August 2011 memorandum did not address the Defense’s concerns regarding the delay of over a year that had already ensued in the classification review process and the inadequacy of the Government’s explanations. The memorandum did not state any new reasons why the request for delay had been granted.

38. The sixth Government delay request since April 2011 was made on 26 September 2011, three days *after* the Convening Authority’s deadline for a Government update on the status of the classification review process. *See* 26 September 2011 Government Request for Delay, Attachment 46; 29 August 2011 Memorandum Approving the Government’s Request for Delay, Attachment 45 (ordering the Government to provide the Convening Authority with an update “no later than 23 September 2011”). As always, the reason for the Government request for delay was the ongoing classification review process. *See id.* at 1. Once again, the Government explained, without elaboration, that it was “continuing” to work with the relevant OCAs. *Id.* The Government did not explain why the classification review process has still not run its course, over a year and two months after PFC Manning was placed into pretrial confinement and charges were preferred.

39. The Defense opposed the Government’s sixth request for delay on 27 September 2011. *See* 27 September 2011 Email from Mr. Coombs to COL Coffman Opposing the Government’s Request for Delay, Attachment 47. The Defense reiterated its position that any delay should not be excluded under R.C.M. 707(c), but rather should be credited to the Government for speedy trial purposes. *Id.*

40. The Convening Authority approved the Government’s sixth request for delay of the Article 32 hearing on 28 September 2011. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. The Convening Authority excluded “[t]he period between 22 April 2011 and the restart of the Article 32 Investigation [a]s excludable delay under RCM 707(c).” *Id.* This memorandum was a virtual carbon copy of the 5 July 2011, 26 July 2011, and 29 August 2011 memoranda approving the various prior Government requests for delay; only the dates had been changed. *See id.*; 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45; 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41; 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The Convening Authority offered no new reasons for approving this sixth request for delay, and it did not respond to the Defense’s concerns articulated in the 25 July 2011 memorandum opposing the Government’s July request for delay, which had been reiterated on several occasions. The Convening Authority also did not mention that the Government had disobeyed the order to provide an update no later than 23 September 2011.

41. The Convening Authority issued another excludable delay memorandum on 14 October 2011, in which the period from 15 September 2011 to 14 October 2011 was found to be excludable delay under R.C.M. 707(c). *See* 14 October 2011 Excludable Delay Memorandum, Attachment 49. The basis for the excludable delay identified in the 14 October 2011 memorandum was virtually identical to the 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. *See id.*; 10 August 2011 Excludable Delay Memorandum, Attachment 42; 17 June 2011 Excludable Delay Memorandum, Attachment 35; 12 May 2011 Excludable Delay Memorandum, Attachment 32. The only thing that made the 14 October 2011 excludable delay memorandum different from any of these prior memoranda was the substitution of the Government's sixth request for delay in place of the particular Government request delay that was identified in each prior memorandum. The Convening Authority once again gave no reasons why delaying the Article 32 for the completion of the classification review process was still reasonable, given the year and three months that had passed since the prefferal of charges. The Convening Authority also included the stock line that had been repeated numerous times before: "I acknowledge and reviewed the defense request for speedy trial, dated January 13 2011 (enclosed), and the renewed request for speedy trial, dated 25 July 2011 (enclosed)." 14 October 2011 Excludable Delay Memorandum, Attachment 49 (parentheticals in original).

42. The Government made its seventh request to delay the Article 32 hearing on 25 October 2011. *See* 25 October 2011 Government Request for Delay, Attachment 50. The reasons for the requested delay were the same as ever: the Government still needed more time to obtain authority to release evidence and information to the defense. *See id.* at 1. The Government assured the Convening Authority that it was still "continuing" to work with the OCAs. *Id.* However, the Government remained as vague as it had been throughout this protracted process, not specifying exactly what had already been done or exactly what remained to be done.

43. The Defense opposed this request for delay on the same day. *See* 25 October 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 51. In this email, the Defense repeated its previous position that any additional delay should not be excluded under R.C.M. 707(c) but should be credited to the Government for speedy trial purposes. *Id.*

44. The Convening Authority approved the Government's seventh request for delay on 27 October 2011, excluding the period from 22 April 2011 until the restart of the Article 32 hearing under R.C.M. 707(c). *See* 27 October 2011 Memorandum Approving Government Request for Delay, Attachment 52. When compared to the various prior memoranda approving the numerous Government request for delay, the October memorandum had simply updated the stated dates. *See id.* No new reasons for the delay were discussed, and the Convening Authority did not explain why this additional exclusion of time was still reasonable, given the year-plus period of time that had already gone by in which the Government was unable to complete the classification review process.

45. Beginning on 24 October 2011, the long-awaited OCA classification reviews began to trickle in. The Government provided the Defense with the DISA classification review on 24 October 2011. That classification review – a one page document – was completed on 6 June 2011. The Government offered no explanation for the four-and-a-half month delay between the

completion of the classification review and its disclosure to the Defense. The Government provided the three-page Apache Video classification review, which was completed on 26 August 2010, to the Defense on 4 November 2011. The Defense received no explanation for the delay of over a year and two months between the completion of this classification review and its disclosure to the Defense. The Government also provided a 28-page Other Government Agency classification review to the Defense on 4 November 2011. The Government provided a few more classification reviews to the Defense on 8 November 2011. This round of disclosure included a three-page CENTCOM PowerPoint classification review that was completed on 21 February 2011, a 24-page CENTCOM classification review that was completed on 21 October 2011, a four-page CYBERCOM classification review that was completed on 21 July 2011, and a 51-page Department of State classification review that was completed on 30 October 2011. The Government did not explain the reason for the eight-plus month delay between the completion of the CENTCOM PowerPoint classification review and its disclosure or the reason for the three-plus month delay between the completion of the CYBERCOM classification review and its disclosure. Additionally, on 17 November 2011, the Government provided the Defense with the four-page GTMO classification review, completed on 4 November 2011. Finally, the Defense was provided with two classification reviews on 12 December 2011: a three-page Other Government Agency classification review and a 12-page Other Government Agency classification review.

46. On 16 November 2011, the Convening Authority issued yet another excludable delay memorandum. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. This memorandum excluded the period from 14 October 2011 to 16 November 2011 under R.C.M. 707(c). *Id.* As had been the case for the last several excludable delay memoranda, the articulated basis for this most recent delay was the following: the OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for the results of the Government's classification reviews (made a year and two months prior to the latest Government request for delay); and the Government's seventh request for delay. *See id.* As usual, the Convening Authority failed to articulate any new reasons that made this delay reasonable. Finally, the Convening Authority once again repeated its familiar refrain that it had "acknowledge[d] and reviewed" the Defense's 13 January 2011 and 25 July 2011 speedy trial requests. *Id.*

47. That same day, the Government requested to restart the Article 32 investigation. *See* 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54. At first blush, it seemed that the Government was finally ready to proceed to the Article 32 hearing a year and a half after PFC Manning was first placed in pretrial confinement. In fact, in the second sentence of its request, the Government related that "[t]he prosecution is prepared to proceed and, by 1 December 2011, should receive all approvals and classification reviews necessary to proceed." *Id.* at 1. First appearances were deceiving, however, as the Government's self-titled request to restart the Article 32 investigation was, in actuality, a poorly-concealed eighth request for delay of the Article 32 investigation. Indeed, in the very next sentence of its so-called "Request to Restart Article 32 Investigation," the Government requested that "the period from the date of this memorandum to 16 December 2011 be approved as excludable delay." *Id.* The Government represented that this further 30 day period of delay, on top of the year and a half in which the Government had ostensibly been processing the case after

PFC Manning was in pretrial confinement, was necessary for two reasons. *See id.* at 2. First, the Government was *still* working with an OCA to obtain one final classification review. *Id.* Second, the Government explained that the command required 30 days to execute OPLAN BRAVO, a prerequisite to the Article 32 hearing. *Id.*

48. Later that afternoon, the Defense opposed the Government's eighth request for delay. *See* 16 November 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 55. The Defense email explained that Mr. Coombs had sent an email to then-CPT Fein on Monday, 14 November 2011, in which Mr. Coombs requested that the Government begin its OPLAN BRAVO preparations so that the Article 32 hearing could commence on 12 December 2011. *Id.* The email went on to explain that based on the Government's most recent request for delay, it appeared that the Government had done nothing from 14 November 2011 to 16 November 2011. *Id.* The Defense pointed out that the Government failed to provide the Convening Authority "with any justification for the arbitrary 30-day-requirement in order to complete its OPLAN BRAVO." *Id.* The Defense then requested that the Convening Authority order the Article 32 to commence on 12 December 2011, thereby giving the Government close to its requested 30 days to execute its OPLAN BRAVO while at the same time ensuring that the Article 32 hearing would be completed prior to the holiday period in order to avoid any issues with obtaining needed witnesses. *Id.* Finally, the Defense objected to the Government's request to exclude the time period of 16 November 2011 to 16 December 2011 under R.C.M. 707(c) and requested instead that the delay be credited against the Government for speedy trial purposes. *Id.*

49. Later that same day, the Convening Authority approved the Government's eighth request for delay, excluding the time period from 22 April 2011 to 16 December 2011 under R.C.M. 707(c). *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. Even when judged in comparison to the bare-bones, conclusory "rationale" given by the Convening Authority in the numerous prior excludable delay memoranda and memoranda approving the Government requests for delay, this 16 November 2011 memorandum stands apart. Not only does it not offer a single reason explaining the Convening Authority's decision to grant an eighth Government request for delay, it does not even attempt the pretense of offering reasons. The Convening Authority's decisional process, to the extent that it can be gleaned from this memorandum, is captured in full in the following two sentences: "I reviewed both the prosecution's request and its enclosures and the defense's response. 2. This request is: (signature) approved." *Id.* That's it. That is the extent of the Convening Authority's articulation of its reasons why this requested delay was reasonable. There was no such articulation or even an attempt at such an articulation. Capping a busy day in an otherwise stagnant prosecution, the Convening Authority issued Special Instructions to the Article 32 IO on 16 November 2011. *See* Special Instructions for Investigation under Article 32, Attachment 57. These instructions required that all approvals or denials of requests for delay under R.C.M. 707(c) be in writing. *Id.* at 3.

50. Meanwhile, the Government unloaded a barrage of discovery and forensic evidence in the month or so before commencement of the Article 32 hearing, despite the fact the case had been ongoing for over a year and a half at that time. The sheer volume and lack of organization of this discovery made it virtually impossible for the Defense to sort through the material and organize

it in any coherent manner before the Article 32 hearing took place. Therefore, the Defense was deprived of the ability to use this evidence at the Article 32 hearing as a result of the Government's eleventh hour disclosure.³

51. The Article 32 hearing was conducted from 16 December 2011 through 22 December 2011. On 3 January 2012, the Government asked the Article 32 IO to "exclude, as a reasonable delay, anytime between 22 December 2011 and 3 January 2012 that you did not work on the Article 32 investigation based on the federal holidays and weekends." See 4 January 2012 Email from LTC Almanza to then-CPT Fein, Attachment 58. The next day, the Article 32 IO excluded as reasonable delay the days between 23 December 2011 and 3 January 2012 when he did not work on the Article 32 investigation. See *id.* LTC Almanza did not specify how many days were being excluded. Reference to LTC Almanza's chronology makes clear that he did no work on the Article 32 investigation between the period of 24 December 2011 and 2 January 2012, but these dates are nowhere to be seen in the email approving the Government's delay request. See Chronology of Article 32 IO, Attachment 59, at 4 (listing activity on 23 December 2011 and 3 January 2012 but listing no activity between 24 December 2011 and 2 January 2012). Additionally, LTC Almanza did not wait to hear from the Defense before granting this request for excludable delay. LTC Almanza gave no reasons or explanation for the delay. See *id.* Indeed, the entire exclusion decision, rendered via email, is contained in the following sentence: "I will exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when I did not work on the Article 32 Investigation." *Id.* Moreover, LTC Almanza did not state the legal authority, whether under R.C.M. 707(c), the discussion to that section, or case law, that allows for excluding from the R.C.M. 707 speedy trial clock federal holidays and weekends in which the Article 32 IO did not work on the case. Meanwhile, PFC Manning remained in pretrial confinement for all of December 2011 and January 2012, including on federal holidays and weekends.

52. The Convening Authority issued its last excludable delay memorandum on 3 January 2012. See 3 January 2012 Excludable Delay Memorandum, Attachment 60. This memorandum excluded "[t]he period from 16 November 2011 up to and including 15 December 2011" as excludable delay under R.C.M. 707(c). *Id.* Consistent with its prior excludable delay memoranda, the Convening Authority identified a familiar basis for delay: the OCA reviews of classified information; OCA consent to disclose classified information; the 26 August 2010 Defense request for results of the Government's classification reviews; and the Government's eighth request for delay. See *id.* As usual, the Convening Authority stated no reasons why the various requests and classification reviews that had been cited in every excludable delay memorandum for over a year made this particular excluded period a reasonable one. Finally, the Convening Authority once again "acknowledge[d] and reviewed" the two Defense speedy trial requests. *Id.*

53. On 11 January 2012, LTC Almanza submitted his Article 32 report and recommendations. A little over three weeks later, the GCMCA referred the charges to this Court on 3 February

³ The Government's failure to provide timely discovery did not necessitate a delay in the Article 32 hearing due to the Defense's overall strategy at that point to use the Article 32 as a discovery tool and to highlight the nature of the Government's overcharging of the case. See R.C.M. 405(a) discussion ("The investigation also serves as a means of discovery.").

2012. That same day the Government submitted an Electronic Docket Notification requesting a trial date of 3 April 2012. Three days later, the Defense submitted an Electronic Docket Notification of its own requesting a trial date of 30 April 2012 due to fellow defense counsel being in ILE and other conflicts.

54. Following the initial 802 conference on 8 February 2012, PFC Manning was arraigned on 23 February 2012, 635 days after he was first placed into pretrial confinement.

3. Pre-Arraignment Discovery Delay

55. In addition to making eight consecutive requests that the Article 32 hearing be delayed, the Government was also quite lethargic in its pre-arraignment discovery conduct. The Defense made numerous requests for discovery in the 635 days between PFC Manning was placed into pretrial confinement and his arraignment. The Government's responses to these requests were untimely and woefully inadequate.

56. On 29 October 2010, the Defense made its first discovery request. When the Government did not timely respond, the Defense made subsequent discovery requests on 15 November 2010, 8 December 2010, 10 January 2011, 19 January 2011, and 16 February 2011.

57. Instead of responding in writing to these requests, the Government would just send random, unorganized discovery on compact discs without indicating how, if at all, the provided discovery was responsive to the Defense's six discovery requests. Most of the disclosed material was unnecessarily duplicative. The Government responses, both in their volume and their lack of organization, made any effort by the Defense to inspect the information unnecessarily time-consuming.

58. The Government finally responded in writing to the Defense's six discovery requests on 12 April 2011, nearly six months after the first discovery request. This written response was plainly inadequate, merely offering one of the following responses for each of by the Defense discovery requests: the United States has disclosed a portion of the requested material and understands its continuing obligation to disclose; the United States has disclosed all of the requested material in its possession and understands its continuing obligation disclose; the United States does not have authority to disclose this classified information; or the United States will not provide the information because the Defense has failed to provide any basis for the request.

59. Because of the gross inadequacy of the Government's written response, the Defense made its seventh discovery request on 13 May 2011. After the Government yet again failed to respond in a timely fashion, the Defense made its eighth discovery request on 21 September 2011. In the 21 September 2011 discovery request, the Defense requested that the Government preserve all of the hard drives from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq. The Defense also made subsequent discovery requests on 13 October 2011, 15 November 2011, and 16 November 2011. The Government did not adequately respond to any of these discovery requests.

60. On 1 December 2011, the Defense made a motion to compel production of evidence at the Article 32 hearing. This motion was denied by the Article 32 IO two weeks later, the day before the Article 32 hearing began.

61. On 20 January 2012, the Defense made yet another discovery request. A week later, the Government responded to all outstanding discovery requests. This response was wholly inadequate. Then, on 31 January 2012, the Government sent the Defense a blanket response to the Defense request for discovery of any and all damage assessments, denying the requested discovery because the Defense had failed to provide any basis for its request.

62. Finally, on 16 February 2012, the Defense filed its first motion to compel discovery. *See* Appellate Exhibit VII. The motion explained that, although the Government had provided up to that date approximately 78,148 pages of unclassified discovery to the Defense and approximately 333,194 pages of what the Government considers classified discovery, the vast majority of this discovery was not responsive to the specific items repeatedly requested by the Defense.

4. Periods of Apparent Government Inactivity

63. In addition to the foregoing chronology, there have been several periods of apparent Government inactivity in the processing of this case. From 31 May 2010, when PFC Manning was transferred to Theater Field Confinement Facility, Camp Arifjan, Kuwait, until 5 July 2010, when the original charges were preferred – a period of 36 days – there was no apparent Government activity. *See* Attachment 1. In addition, the Government was evidently inactive for a period of 17 days from 13 July 2010 until 30 July 2010, when PFC Manning was transferred to Quantico. *Id.* Similarly, there was also no apparent Government activity for a period of 20 days from 23 April 2011, the day after the R.C.M. 706 Board's submission of its report, through 12 May 2011, the date of one of the Convening Authority's excludable delay memoranda. *Id.* Likewise, there appears to have been no Government activity for a period of 36 days from 13 May 2011, the day after the Convening Authority's May excludable delay memorandum, to 17 June 2011, the date of the Convening Authority's June excludable delay memorandum. *Id.*

64. The 18-day period from 18 June 2011, the day after the Convening Authority's June excludable delay memorandum, until 5 July 2011, the date of the Convening Authority's approval of the Government's third request for delay of the Article 32 hearing, appears to be equally devoid of any Government activity. *Id.* Additionally, there was no apparent Government activity for a period of 21 days from 6 July 2011, the day after the Convening Authority's approval of the Government's third request for delay, and 26 July 2011, when the Convening Authority approved the Government's fourth request for delay. *Id.* Likewise, there appears to have been no Government activity in the 34-day period between the day after Convening Authority's approval of the Government's fourth request for delay on 26 July 2011 and the Convening Authority's approval of the Government's fifth request for delay on 29 August 2011. *Id.*

65. The Government was evidently equally inactive in the 30-day period from 30 August 2011, the day after the Convening Authority's approval of the Government's fifth request for delay,

through 28 September 2011, when the Convening Authority approved the Government's sixth request for delay. *Id.* Similarly, for a period of 29 days from 29 September 2011, the day after the Convening Authority's approval of the Government's sixth request for delay, until 27 October 2011, when the Convening Authority approved the Government's seventh request for delay, no apparent Government activity occurred. *Id.* Additionally, from the day after the Convening Authority's approval of the Government's seventh request for delay until 15 November 2011 – a period of 19 days – the Government was apparently inactive. *Id.* In addition, the Government appears to have been inactive for a period of 29 days from 17 November 2011 until 15 December 2011. *Id.* Also, for a period of 12 days after the conclusion of the Article 32 hearing on 22 December 2011 until 3 January 2012, it appears as though the Government did nothing to move the case forward. *Id.* Finally, the Government was apparently inactive for a period of 22 days from 12 January 2012, the day after LTC Almanza submitted his Article 32 report and recommendations, and 2 February 2012, the day before the charges were referred. *Id.*

66. In total, from the commencement of PFC Manning's pretrial confinement until PFC Manning's arraignment on 23 February 2012, there were 323 days in which no apparent Government activity has occurred.

B. Post-Arraignment Delay

67. By the time PFC Manning was arraigned on 23 February 2012, the Government's extreme foot-dragging had thoroughly pervaded the case. Things had gotten so bad that on 25 February 2012, the Defense thought it necessary to file a preemptive request with this Court to prevent further Government delay tactics. Following the Defense's filing of its motion for a bill of particulars, the Government took three weeks to file its response, based in part on email glitches experienced by the Government. Not wanting to compound the delay surrounding this motion any further, the Defense requested the following from this Court:

Should you order that such particulars must be given to the Defense, the Government will likely request an extension of time to provide those particulars. Given that the Government will have over three weeks to address this issue, the Defense would request that you direct the Government to be immediately prepared to release the particulars if you rule in favor of the Defense. In other words, if the Court deems that particulars should be provided, the Government should not have any additional time to provide them The particulars sought by the Defense do not require the Government to coordinate with multiple external agencies, search files, or engage in complex legal research. Rather, the particulars simply flesh out the charges that the Government has preferred against my client, and that it has been preparing to prosecute for the past 18 months. While I realize this request may be slightly unusual, the Defense believes that the Government had already received a windfall owing to the email situation; it should not be able to continue to press for extensions of responses to straightforward motions. Any such extension would require the trial calendar to be pushed further out, thereby affecting my client's right to a speedy trial.

68. Additionally, after the Government filed its Response to the Defense Motion to Compel, the Defense and this Court became aware that the Government profoundly misunderstood its basic discovery obligations. As the Defense pointed out in its Reply Motion, the Government Response evidenced that the Government was laboring under three critical misunderstandings of its discovery obligations in a classified evidence case. See Appellate Exhibit XXVI, at 1-2, 7. First, the Government mistakenly asserted that R.C.M. 703, and not R.C.M. 701, governed its discovery obligations. See *id.* at 1-2. It believed that the *Brady* standard governing its mandatory disclosure obligations was narrowly limited to the standard articulated in the Supreme Court case of *Brady v. Maryland*, 373 U.S. 83 (1963), and not that enshrined in R.C.M. 701(a)(6). See *id.* at 2. Second, the Government mistakenly believed that *Brady* only required it to turn over evidence material to the merits of the case and that it did not require the Government to turn over evidence material for sentencing purposes. *Id.* Finally, the Government erroneously interpreted Military Rule of Evidence (M.R.E.) 505 as giving the Government, as opposed to the military judge, the authority to be the arbiter of what should and should not be disclosed after balancing the interests of the accused against the national security concerns in a classified evidence case. *Id.* at 7.

69. Based on the Government's grave ignorance of its discovery obligations, the Defense moved to dismiss all charges on 15 March 2012. See Appellate Exhibit XXXI. The motion explained that for nearly two years the Government had been representing that it has been diligently searching for *Brady* material, and yet the Government had just tipped its hand that it did not come close to comprehending the scope of its *Brady* obligations. *Id.* at 1-2. The Defense pointed out that if the Government was forced to start its *Brady* search anew, as it would be required to do if the charges were not dismissed, the proceeding would be delayed another two years. *Id.* Since PFC Manning had already spent a total of 656 days in pretrial confinement as of the date of the Defense Motion to Dismiss For Discovery Violations, the Defense argued that any additional delay to re-conduct *Brady* searches from scratch would amount to a *per se* violation of PFC Manning's right to a speedy trial. *Id.* at 4. The motion also pointed out that it was impossible to tell how much *Brady* information had been lost or destroyed as a result of the Government's use of an incorrect *Brady* standard for nearly two years. *Id.* at 5.

70. Lest there be any doubt about the Government's interpretation of the discovery rules, the Government clarified its position in an email from then-CPT Fein to this Court, dated 22 March 2012. In that email, the Government stated its position was that R.C.M. 701 does not apply to classified evidence discovery. The email also stated that the Government had, and would continue to, consult the provisions of MRE 505 to determine what information was discoverable and what information was not discoverable, indicating that the Government viewed itself as the one tasked with balancing PFC Manning's right to a fair trial with the national security concerns raised by the classified evidence. See Appellate Exhibit XLIII at 8-9.

71. The next day, this Court issued its ruling on the Defense Motion to Compel. See Appellate Exhibit XXXVI. In this ruling, this Court explained that "[t]he classified information privilege under MRE 505 does not negate the Government's duty to disclose information favorable to the defense and material to punishment under *Brady*." *Id.* at 8. This Court further explained that

"[i]f classified discovery detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c)." *Id.* at 10. Speaking more generally about the Government's discovery obligations, the Court noted that "[t]rial counsel have a due diligence duty to review the files of others acting on the Government's behalf in the case for favorable evidence material to guilt or punishment." *Id.* at 8. Finally, this Court ordered the Government to "**immediately:**" (i) begin the process of producing the requested damage assessments; and (ii) cause an inspection of the 14 hard drives of computers from the T-SCIF and the TOC of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq and provide the results of those inspections no later than 20 April 2012. *Id.* at 12 (emphasis in original).

72. On 16 April 2012, then-CPT Fein sent an email to Mr. Coombs explaining that, of the 14 hard drives referenced in the Defense's 21 September 2011 Discovery Request and the Court's 23 March 2012 ruling on the Defense Motion to Compel, 2 drives were completely inoperable, 7 drives were wiped, and 1 drive was partially wiped. *See* Appellate Exhibit XLIII, at 15-16. The email did not state when the 8 drives were wiped.

73. The next day, the Defense filed its Reply Motion to Dismiss for Discovery Violations. The motion urged that dismissal was a proper remedy for the discovery violations because there was ample evidence to support the contention that the discovery violations were willful, as the Government seemed to be resisting handing over exculpatory evidence at every turn. *Id.* at 9-10. The motion reiterated the argument raised in the Defense Motion to Dismiss for Discovery Violations that if the charges were not dismissed the Government would have to conduct its *Brady* searches anew, and the resultant delay would surely violate PFC Manning's speedy trial rights. *Id.* at 15. Additionally, the Defense took issue with the Government's need to delay the proceedings until 18 May 2012 to decide whether to assert a privilege with respect to any classified information. *Id.* at 12 n.4. The Defense pointed out that the Government claimed that it needed an extra four months after referral of charges in which to find out whether the equity holders would assert a privilege. *Id.* Finally, the Defense expressed concern about the destruction of several of the 14 hard drives, noting that the CID requested that the evidence be preserved in September 2010, and the Defense also filed a preservation request in September 2011. *Id.* at 15-16.

74. On 25 April 2012, this Court issued a ruling on the Defense Motion to Dismiss for Discovery Violations. *See* Appellate Exhibit LXVIII. In that ruling, this Court confirmed that the Government had indeed been operating under a grave misunderstanding of its discovery obligations for some time:

From the 8 March 2012 Government response to Defense Motion to Compel Discovery and its email of 22 March 2012, the Court finds that the Government believed RCM 701 did not govern disclosure of classified information for discovery where no privilege has been invoked under MRE 505. This was an incorrect belief. The Court finds that the Government properly understood its obligation to search for exculpatory *Brady* material, however, the Government

disputed that it was obligated to disclose classified *Brady* information that was material to punishment only.

Id. at 2.

75. On 10 May 2012, the Defense filed a second motion to compel. *See* Appellate Exhibit XCVI. Based on the meager 12 pages of *Brady* material that the Government had provided the Defense as of that date, 713 days after PFC Manning was first placed in pretrial confinement and 676 days after the original charges were preferred, the Defense requested this Court to require the Government to state on the record the steps it had taken in fulfilling its *Brady* obligations. *See id.* at 10. The Defense related to this Court that the Government had sent out a memo on 29 July 2011, over a year after PFC Manning was placed into pretrial confinement and charges were preferred, to Headquarters, Department of the Army (HQDA) requesting it to task Principal Officials to search for, and preserve, any discoverable information. *Id.* at 13-14. Moreover, a 17 April 2012 HQDA memorandum confirmed that no action had yet been taken on the 29 July 2011 memorandum. Almost two full years after PFC Manning's arrest, the Government had not even been able to complete a *Brady* search of files in the Department of the Army. *Id.*

76. On 30 May 2012, the Defense filed a Supplement Motion to Compel 2. *See* Appellate Exhibit XCIX. In this Supplement, the Defense explained that at the 30 May 2012 802 telephonic conference the Government admitted that it still had not reviewed Department of State documents for which the Defense had made a discovery request in 2011. *Id.* at 2. The Defense related its frustration that it had, two years after the Government had supposedly begun its *Brady* search, only received 12 pages of unclassified *Brady* material and was still waiting on the bulk of the *Brady* material. *Id.* at 3-4. The Defense further pointed out in its Reply to the Government's Response to the Supplement Motion to Compel 2, dated 11 July 2012, that the Government was *still*, over two years after the prefferal of charges, continuing to search the military's own files for *Brady* material. *See* Appellate Exhibit CI, at 10.

77. On 8 June 2012, following testimony by Department of State witnesses at a motions hearing, this Court ordered the prosecution to begin the process of searching for and inspecting the following Department of State records:

- (1) Written assessments produced by the Chiefs of Mission used to formulate a portion of the draft damage assessment completed in August of 2011;
- (2) Written Situational Reports produced by the WikiLeaks Working Group between roughly 28 November 2010 and 17 December 2010;
- (3) Written minutes and agendas of meetings by the Mitigation Team;
- (4) Information Memorandum for the Secretary of State produced by the WPAR;
- (5) A matrix produced by WPAR to track identified individuals;

(6) Formal guidance produced by WPAR and provided to all embassies, including authorized actions for any identified person at risk;

(7) Information collected by the Director of the Office of Counter Intelligence and Consular Support within the Department of State regarding any possible impact from the disclosure of diplomatic cables; and

(8) Any prepared written statements for the Department's reporting to Congress on 7 and 9 December 2010.

See Appellate Exhibit CXLII, at 1-2. On 9 July 2012, the Government completed its search and inspection of these records. *See id.* at 2-4. The Government did not explain why it was unable to conduct this search and inspection of these documents – which only took 30 days – during the 741 days that PFC Manning was in confinement at the date of the 7 June 2012 motions hearing. Additionally, despite the fact that the Government had completed its search for and inspection of these documents in 30 days, it requested 45-60 days delay of any Court order to compel production of those documents in order to allow the Government to decide whether to seek limited disclosure or claim a privilege under M.R.E. 505. *See id.* at 6.

78. During this timeframe, the Government also disclosed that ONCIX had prepared a draft damage assessment and that the FBI had prepared an impact statement looking into the apparent damage caused by the alleged leaks. *See Appellate Exhibit CLXXIII*. In support of its motion for a due diligence statement, the Defense chronicled the open questions that existed in respect of these particular items: Why didn't the Government tell the Court about the ONCIX damage assessment earlier? Why had the Government used the phrase "ONCIX has not completed an interim or final damage assessment"? When did the Government learn about the FBI impact statement? The Government did not provide satisfactory answers to these questions.

79. On 25 June 2012, this Court ordered the Government to provide a due diligence statement to the Court. *See Appellate Exhibit CLXXVII*, at 2-3. Specifically, this Court ordered the following:

By **25 July 2012**, the Government will provide the Court with a statement of due diligence, in the format attached, stating:

- a. Steps the Government has taken to inquire about the existence of files pertaining to PFC Manning from Government agencies/entities;
- b. When these inquiries were made;
- c. When the Government became aware of the existence of each file pertaining to PFC Manning from Government agencies/entities;
- d. What files the Government has searched for *Brady/RCM 701(a)(6)* information and when;

e. What files the Government has searched for information material to the preparation of the defense IAW RCM 701(a)(2) and when.

f. What information from the above files the Government has disclosed to the Defense;

g. What files the Government has reviewed and found no discoverable information;

h. What files the Government has decided not to disclose to the Defense,

i. What files the Government has identified that have yet to be searched for Brady/RCM 701(a)(6) and/or RCM 701(a)(2).

By **25 July 2012**, the Government will provide a timeline and synopsis of the inquiries and communications between the Government and ONCIX.

Id. at 2-3 (emphases in original). This Court further provided that the proceedings would not be suspended because of the Government's due diligence statement. *Id.* at 3.

80. The Government yet again requested more time to disclose all *Brady* material to the Defense on 25 July 2012. *See* Appellate Exhibit 226, at 1. The Government explained that it was still searching files for *Brady* material, and therefore could not make its 3 August 2012 deadline for disclosure of all outstanding *Brady* material. *Id.* The Government related that it would also be unable to obtain the necessary approvals from the requisite equity holders to disclose any *Brady* material uncovered in its search by the 3 August 2012 deadline. *Id.* Therefore, the Government requested that the deadline be pushed back to 14 September 2012, 840 days after PFC Manning was first placed into pretrial confinement. *See id.*

81. To this date, much discovery is still up in the air. In an email from MAJ Fein to the Court and the Defense on 14 September, MAJ Fein chronicled the numerous Government filings pertaining to outstanding discovery issues:

1. Government Ex Parte RCM 701(g)(2) Motion for a DHS document. The motion and its enclosures are being submitted via NIPR in a separate email. Attached to this email is a redacted version for the defense.
2. Government MRE 505(g)(2) Motion for DOS Information. The motion and its enclosures are being submitted via NIPR in this email. Two of the enclosures are being submitted via NIPR in a separate email.
3. Government MRE 505(g)(2) Motion for CIA Information. The motion and its enclosures are being submitted via SIPR and hand delivery on Monday.
4. Government Notice to the Court for Government MRE 505(g)(2) Motion for DOS and CIA Information, which includes the unclassified and redacted version of the CIA

motion.

5. Government Notice to the Court for ODNI Information.

6. Government Supplemental Filing for MRE 505(g)(2) Filing for FBI Investigative File. The supplement is attached. The classified enclosures are being submitted ex parte via SIPR and hand delivery on Monday.

See 14 September 2012 Email from MAJ Fein to COL Lind, Attachment 67. These outstanding issues will be resolved over the next few months, likely meaning that it will not be until November 2012 that the Defense has all relevant discovery in its possession (over 900 days after PFC Manning was placed in pretrial confinement).

82. Finally, the Defense's previously articulated concern of the Government dumping evidence on the Defense on the eve of trial or key motions materialized on 26 July 2012. That night, the Government sent to the Defense 84 emails that it characterized as "obviously material to the preparation of the defense for Article 13 purposes." 26 July 2012 Email from MAJ Fein to Mr. Coombs, Attachment 62. The Defense Article 13 Motion was due the next day. At 12:54 a.m. on 27 July 2012, the Defense relayed to this Court the quite literal last minute disclosure of these emails:

MAJ Fein just notified the Defense of the existence of 60 emails that the Government determined were material to the preparation of the defense for the Article 13 motion which, as you know, is due tomorrow. At 2115, MAJ Fein sent the Defense copies of the emails. The Defense cannot understand why it is getting these emails the night before its motion is due. The Defense had requested any documentation pertaining to PFC Manning's confinement while at Quantico over a year and a half ago, in a discovery request dated 8 December 2010.

27 July 2012 Email from Mr. Coombs to COL Lind, MJ, Attachment 63.

83. MAJ Fein related that the Government "received the emails with the original documents approximately six months ago and prioritized their review for Giglio/Jencks material based on potential witnesses." 27 July 2012 Email from MAJ Fein to Mr. Coombs, Attachment 64. However, MAJ Fein admitted that the Government had just started to review the emails:

On Wednesday [25 July 2012], the prosecution started reviewing the emails for potential impeachment evidence or Jencks material, and during that review found 84 emails which we deemed obviously material to the preparation of the defense for Article 13 purposes. Within 24 hours, the United States notified the defense and sent the emails last night [Thursday July 26].

27 July 2012 Email from MAJ Fein to COL Lind, MJ, Attachment 65. MAJ Fein attempted to minimize any effect that this eleventh hour disclosure would have on the Defense's Article 13 Motion: "the United States still sees no reason why the defense will not have adequate time to

prepare its Article 13 motion, and especially since this the majority of these emails appear to only bolster the defense's current argument, as proffered in the Article 13 witness list litigation." *Id.* The Defense then voiced its displeasure with the MAJ Fein's remarks:

What matters is that 84 emails were dumped on the Defense the night before the Article 13 motion was due, after I had already sent the Defense attachments and just prior to leaving the country for family reasons.

The Government avoids addressing the two issues that I raised. First, I need additional time to incorporate these emails into my motion. The Government seems to suggest that the emails simply support the arguments that I was in the process of already making, (i.e. I was on the right track). However, these emails do much more than simply support our argument. The emails change the basis of the Defense's argument. When does the Government propose that the Defense incorporate these emails into our motion? Based upon the Government's email it would seem that it would have us do this today.

Second, due to the nature of these emails, the Defense believes that additional witnesses will be needed for the motion. The question is not necessarily just interviewing potential witnesses, but likely litigating with the Government over whether the witnesses will be produced.

How the Government could have waited so long to look at these emails which should have been produced as part of its discovery obligations is beyond me. The fact that the Government is now trying to hold the Defense to a time line of today when the need for a delay is due to their lack of diligence is unbelievable. The Defense has repeated since referral its concern that information would be dumped on us on the eve of trial. This is [a] perfect example of the Defense's concerns coming to fruition.

27 July 2012 Email from Mr. Coombs to COL Lind, MJ, Attachment 66.

84. As a result of the incredible last minute disclosure and the disclosure of the existence of an additional 1,294 emails within the Government's possession, further delay has ensued. The Article 13 motions hearing has been pushed back to 27 November 2012. The disclosure of additional emails necessitated the filing of a supplemental Article 13 motion and a supplementary witness list. The Defense filed a motion to compel with respect to the 1,294 emails that the Government did not disclose. At that point, the Government "voluntarily" turned over approximately 600 more emails that were apparently material to the preparation of the defense, with no explanation as to why these were not produced earlier. The Court then reviewed the remaining 600 or so emails and determined that *all but twelve* were material to the preparation of the defense. Of course, the needless delay in consideration of the Article 13 motion was, as always has been the case, occasioned by the Government's lack of due diligence.

85. Currently, PFC Manning's trial is scheduled to commence on 4 February 2013. As of that date, PFC Manning will have spent 983 days in pretrial confinement.

WITNESSES/EVIDENCE

86. The Defense requests the following witnesses be produced for the purposes of this motion:

- a. COL Carl Coffman, United States Forces-Afghanistan, carl.coffman@us.army.mil;
- b. SFC Monica Carlile, United States Army Legal Services Agency (USALSA), monica.carlile@us.army.mil;
- c. LTC Paul Almanza, paul.r.almanza@us.army.mil or paul.almanza@usdoj.gov;
- d. Dr. Michael Sweda, Chief, Forensic Psychology Service, michael.sweda@us.army.mil;
- e. Original Classification Authorities (OCAs). The Defense requests the Government produce a witness from each of the following OCAs: United States Central Command (CENTCOM); Joint Task Force – Guantanamo (JTF-GTMO); Department of State (DOS); Office of the Director of National Intelligence (ODNI); Other Government Agency for Specifications 3 and 15 of Charge II; Defense Information Systems Agency (DISA); and United States Cyber Command (CYBERCOM). See Appellate Exhibit 256.
- f. The Defense requests a witness from each of the following organizations: Headquarters Department of the Army (HQDA); Department of State (DOS) and Diplomatic Security Services (DSS); Federal Bureau of Investigation (FBI); Department of Homeland Security (DHS); Office of the National Counterintelligence Executive (ONCIX); DIA, DISA, CENTCOM, SOUTHCOM, CYERCOM; DOJ; Other Government Agency; and each of the previously identified 63 Agencies. See Appellate Exhibit 256.

LEGAL FRAMEWORK

87. There are several sources of a Soldier's right to a speedy trial. See *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Birge*, 52 M.J. 209, 210-11 & nn.3-4 (C.A.A.F. 1999). These sources include, among others, the Sixth Amendment to the United States Constitution, Article 10, and R.C.M. 707, under which PFC Manning moves this Court for speedy trial relief. See *Lazauskas*, 62 M.J. at 41; *Cooper*, 58 M.J. at 57; *Birge*, 52 M.J. at 210-11. The numerous speedy trial sources complement one another, and together they serve several salutary purposes. As the Court of Appeals for the Armed Forces explained in *Mizgala*:

Congress enacted various speedy trial provisions in the UCMJ to address concerns about “the length of time that a man will be placed in confinement and held there pending his trial”; to prevent an accused from “languish[ing] in a jail somewhere for a considerable length of time” awaiting trial or disposition of charges; to protect the accused's rights to a speedy trial without sacrificing the

ability to defend himself; to provide responsibility in the event that someone unnecessarily delays a trial; and to establish speedy trial protections under the UCMJ "consistent with good procedure and justice."

61 M.J. at 124 (citations omitted). Because the analysis under R.C.M. 707 is distinct from the analysis under Article 10, the legal framework for each speedy trial provision is discussed separately below.⁴

A. R.C.M. 707

88. Rule for Courts-Martial 707 "was drafted not only to address an accused's constitutional and statutory speedy-trial rights but also to 'protect[] the command and societal interest in the prompt administration of justice.'" *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997). To serve these ends, R.C.M. 707(a) sets forth a 120-day speedy trial clock: "The accused shall be brought to trial within 120 days after the earlier of: (1) [p]referral of charges; (2) [t]he imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a).⁵ As the then-Court of Military Appeals has remarked, "[t]he duty to proceed in these matters in a timely, efficient manner is imperative at all stages of the process, from the first minute of day 1 to the last minute of day 120." *United States v. Carlisle*, 25 M.J. 426, 429 (C.M.A. 1988).

⁴ As explained in more detail below, *see infra* note 4, the same factors are analyzed under the Sixth Amendment analysis and the Article 10 analysis. Therefore, the remainder of this section discusses the legal framework of R.C.M. 707 and Article 10 only. The legal framework for the Sixth Amendment analysis is covered in the discussion of Article 10's legal framework, *infra*.

⁵ R.C.M. 707(a)(2) defines "imposition of restraint" by reference to R.C.M. 304(a)(2)-(4). That rule provides as follows:

Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest.* Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses.

R.C.M. 304(a)(2)-(4) (italics in original). Additionally, substance prevails over form under R.C.M. 304(a): "The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest." R.C.M. 304(a) discussion.

89. Subsection (b) of R.C.M. 707 provides several rules on how the R.C.M. 707 speedy trial clock operates. For instance, the day on which the triggering event under R.C.M. 707(a) occurs – whether it be the preferral of charges, the imposition of restraint, or entry on active duty – is not counted for purposes of the 120-day clock. R.C.M. 707(b)(1). Additionally, subsection (b) clarifies that an “accused is brought to trial within the meaning of [R.C.M. 707] at the time of arraignment under R.C.M. 904.” *Id.*; see *Cooper*, 58 M.J. at 59 (“[T]he duty imposed on the Government by R.C.M. 707 is to arraign an accused within 120 days of preferral of charges or pretrial confinement, or face dismissal of the charges.”); *United States v. Doty*, 51 M.J. 464, 464 (C.A.A.F. 1999) (similar). Unlike the date on which the triggering event occurs, “[t]he date on which the accused is brought to trial [i.e. arraigned] shall count” for purposes of the 120-day speedy trial clock. R.C.M. 707(b)(1).

90. Subsection (c) of R.C.M. 707 sets forth the standard and procedure for excluding periods of delay from the R.C.M. 707 speedy trial clock. It provides in full as follows:

All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

R.C.M. 707(c) (italics in original). The discussion section to R.C.M. 707(c) makes clear that only “reasonable delay” may be excluded from the speedy trial clock: “[t]he decision to grant or deny a *reasonable delay* is a matter within the sole discretion of the convening authority or a military judge.” R.C.M. 707(c) discussion (emphasis supplied). The discussion sets forth some reasons that reasonable delay may be excluded:

This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Id. The discussion section also provides that “[p]retrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.” *Id.*

91. In addition to the discussion section R.C.M. 707(c), case law demonstrates that any delay excluded under R.C.M. 707(c) must be reasonable. See *United States v. Savard*, No. ACM 37346, 2010 WL 4068964, at *3 (A.F. Ct. Crim. App. Jan. 19, 2010) (unpub.) (“[T]o be excludable the reason for the delay must be reasonable.”); *United States v. Melvin*, No. ACM 37081, 2009 WL 613883, at *7 (A.F. Ct. Crim. App. March 4, 2009) (unpub.) (same); *United States v. Billquist*, No. ACM 35003, 2008 WL 2259774, at *2 (A.F. Ct. Crim. App. May 30, 2008) (unpub.) (same); *United States v. Brown*, No. ACM 36607, 2008 WL 1956589, at *9 (A.F. Ct. Crim. App. Apr. 23, 2008) (unpub.) (“As long as the length of the delay is reasonable and the approving official did not abuse his discretion, it is excluded from the 120-day speedy trial clock.”); *United States v. McDuffie*, 65 M.J. 631, 634 (A.F. Ct. Crim. App. 2007) (same); *United States v. Fujiwara*, 64 M.J. 695, 699 (A.F. Ct. Crim. App. 2007) (same); *United States v. Rowe*, No. ACM 34578, 2003 WL 828986, at *1 (A.F. Ct. Crim. App. Feb. 28, 2003) (unpub.) (“A decision to grant a delay under R.C.M. 707 is reviewed for abuse of discretion and reasonableness.”); *United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003) (same); *United States v. Weatherspoon*, 39 M.J. 762, 766 (A.C.M.R. 1994) (same); *United States v. Hayes*, 37 M.J. 769, 772 (A.C.M.R. 1993) (same). Additionally, the Government bears the burden of proving the facts to support a conclusion that the challenged periods of excludable delay were “reasonable.” See R.C.M. 905(c)(2)(B).

92. This Court reviews the Convening Authority’s decision to exclude a certain period of delay under R.C.M. 707(c) under the abuse of discretion standard. See *Lazauskas*, 62 M.J. at 41-42 (“If the issue of speedy trial under R.C.M. 707 is raised before the military judge at trial, the issue is not which party is responsible for the delay but whether the decision of the officer granting the delay was an abuse of discretion.”); *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999). As Judge Baker explained in *Lazauskas*, the Manual for Courts-Martial envisions that, in order to survive abuse of discretion review, the Convening Authority must make an independent determination that there was good cause for the delay that was excluded:

[T]he decision to grant must be reasonable based on the reasons, facts or circumstances presented. Otherwise, such a grant would constitute an abuse of discretion. This view finds support in the analysis in the *Manual for Courts-Martial, United States* (2002 ed.) (MCM) contained in the non-binding discussion accompanying R.C.M. 707(c) stating that ‘Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances.’ MCM, Analysis of the Rules for Courts-Martial A21-42 (emphasis added).

62 M.J. at 45 (Baker, J., concurring) (emphasis in original); see *Thompson*, 46 M.J. at 474-75 (quoting this language from the MCM).

93. Subsection (d) of R.C.M. 707 provides the remedy for a violation of R.C.M. 707's speedy trial clock: "dismissal of the affected charges." R.C.M. 707(d)(1). The dismissal can be with or without prejudice. R.C.M. 707(d)(1). In determining which type of dismissal to order, R.C.M. 707(d) directs military judges to consider a variety of factors, including: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." *Id.*; see *United States v. Dooley*, 61 M.J. 258, 259 n.6 (C.A.A.F. 2005) (listing these factors); *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000) (outlining this multi-factor framework and conducting an analysis under it). However, "[t]he charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial." R.C.M. 707(d)(1).

B. Article 10

94. The constitutional right to speedy trial is a fundamental right of a military accused, protected by both the Sixth Amendment and Article 10. *Mizgala*, 61 M.J. at 124; *Cooper*, 58 M.J. at 60. Article 10 provides that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, *immediate steps* shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. 10 U.S.C. § 810 (emphasis supplied). The protections of Article 10 become available after "arrest or confinement," as those terms are used in Article 10. 10 U.S.C. § 810; see *United States v. Schuber*, 70 M.J. 181, 184 (C.A.A.F. 2011). Unlike R.C.M. 707, however, the protections of Article 10 extend beyond the date of arraignment. *Cooper*, 58 M.J. at 59-60. Under Article 10, "the Government must . . . move diligently to trial and the entire period up to trying the accused will be reviewed for reasonable diligence on the part of the Government." *Id.* at 60.

95. Military courts have interpreted the "immediate steps" mandate of Article 10 as requiring "reasonable diligence." See *Schuber*, 70 M.J. at 188; *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010); *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *Mizgala*, 61 M.J. at 127; *Cooper*, 58 M.J. at 58; *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Article 10 does "not demand constant motion, but reasonable diligence in bringing the charges to trial." *Cossio*, 64 M.J. at 256; see *Thompson*, 68 M.J. at 312; *Mizgala*, 61 M.J. at 127. "Short periods of inactivity are not fatal to an otherwise active prosecution." *Thompson*, 68 M.J. at 312 (quoting *Mizgala*, 61 M.J. at 127); see *Cossio*, 64 M.J. at 256; *Kossman*, 38 M.J. at 262 ("Article 10 does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind."). When assessing whether the Government has complied with the reasonable diligence standard in any particular case, courts look at the proceeding as a whole, and the "essential ingredient is orderly expedition and not mere speed." *Mizgala*, 61 M.J. at 129 (quoting *United States v. Mason*, 45 C.M.R. 163, 167 (C.M.A. 1972)); see *Thompson*, 68 M.J. at 312.

96. Government diligence in any particular case can fall short of the reasonable diligence benchmark even in the absence of bad faith or gross neglect. As the *Mizgala* Court explained, "An Article 10 violation rests in the failure of the Government to proceed with reasonable diligence. A conclusion of unreasonable diligence may arise from a number of different causes and need not rise to the level of gross neglect to support a violation." 61 M.J. at 129. Along the

same lines, the then-Court of Military Appeals observed in *Kossman* that “where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to,” Article 10 has been violated. 38 M.J. at 261; see *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996). In plain terms, the Article 10 inquiry asks “whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing.” *Kossman*, 38 M.J. at 262. The Government bears the burden of proving that it has moved the case forward with the required reasonable diligence. See *Mizgala*, 61 M.J. at 125 (“Under Article 10, the Government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss.”).

97. To assess whether the Government has used reasonable diligence in processing the case, courts look to a four-factor procedural framework. See *Schuber*, 70 M.J. at 188; *Thompson*, 68 M.J. at 312. “The procedural framework for analyzing Article 10 issues examines the length of the delay, the reasons for the delay, whether the accused made a demand for a speedy trial, and prejudice to the accused.” *Thompson*, 68 M.J. at 312; see *Schuber*, 70 M.J. at 188; *Cossio*, 64 M.J. at 256; *Mizgala*, 61 M.J. at 127, 129; *Birge*, 52 M.J. at 212.⁶ Each factor of this procedural framework is discussed in more detail below.

98. The length of delay factor operates, to some extent, as a triggering mechanism. See *Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256. “[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, ‘there is no necessity for inquiry into the other factors that go into the balance.’” *Cossio*, 64 M.J. at 256 (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir.1996)); see *Schuber*, 70 M.J. at 188. To determine whether the delay in a given case has been “presumptively prejudicial,” courts look at the particular circumstances of the case, including “the seriousness of the offense; the complexity of the case; and the availability of proof;” whether the accused was “informed of the accusations against him; whether the Government complied with procedures relating to pretrial confinement, and whether the Government was responsive to requests for reconsideration of pretrial confinement.” *Schuber*, 70 M.J. at 188; see *Thompson*, 68 M.J. at 315 (Stucky, J., concurring in the result); *Kossman*, 38 M.J. at 261-62. Ultimately, however, “an analysis of the first factor is not meant to be a *Barker* analysis within a *Barker* analysis.” *Schuber*, 70 M.J. at 188. Rather, this first factor in the Article 10 procedural framework simply serves to screen off those cases in which the delay is not facially unreasonable. See *Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256.

99. Under the second factor in the procedural framework – the reasons for delay factor – courts carefully scrutinize the Government’s articulated reasons for delay to ensure that the Government has not spent too long in a “waiting posture.” See *Mizgala*, 61 M.J. at 129. Courts

⁶ The four factors identified in the above-quoted procedural framework are derived from the *Barker* factors used under the Sixth Amendment speedy trial analysis. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (adopting these same four factors). Therefore, the analysis under Article 10 and the analysis under the Sixth Amendment examine the same factors. However, while the two analyses are similar, it is bedrock law that Article 10 creates a far more exacting speedy trial demand than the Sixth Amendment does. See *Schuber*, 70 M.J. at 184, 188; *Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256; *Mizgala*, 61 M.J. at 124-25; *Cooper*, 58 M.J. at 60; *Birge*, 52 M.J. at 211-12. Thus, despite the similarities between the two inquiries, “because Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment, ‘Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation.’” *Thompson*, 68 M.J. at 312 (quoting *Mizgala*, 61 M.J. at 127).

must be careful not to accept as legitimate Government justifications that simply “reflect the realities of military criminal practice.” *Thompson*, 68 M.J. at 313 (“As a general matter, factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision, consistent with the Government’s Article 10 responsibilities.”).

100. The third factor in the procedural framework – whether the accused made a demand for a speedy trial – is straightforward. When a demand is made, courts inquire as to how early the demand was made in the context of the entire proceedings and the genuineness of that demand. *See Thompson*, 68 M.J. at 313 (“We also take into account the fact that [the accused] did not make a speedy trial request during the entire pretrial day period addressed by the military judge.”); *Kossmann*, 38 M.J. at 262 (“Stratagems such as demanding a speedy trial now, when the defense knows the Government cannot possibly proceed, only to seek a continuance later, when the Government is ready, may belie the genuineness of the initial request.”).

101. Finally, courts look at three interests of the accused when analyzing the prejudice factor. The *Cossio* Court quoted the Supreme Court’s discussion of the prejudice factor in *Barker v. Wingo*:

Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

64 M.J. at 257 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)); *see Mizgala*, 61 M.J. at 129 (identifying these three interests); *see also Schuber*, 70 M.J. at 191 (Erdmann, J., dissenting in part and concurring in the judgment) (same); *United States v. Miller*, 66 M.J. 571, 575 (N-M. Ct. Crim. App. 2008) (“the inability of [a defendant] adequately to prepare his case skews the fairness of the entire system”).

102. The Court of Appeals for the Armed Forces has emphasized the importance of treating “the procedural framework as an integrated process, rather than as a set of discrete factors.” *Thompson*, 68 M.J. at 313; *see Mizgala*, 61 M.J. at 129.

103. It is important to recognize that the Article 10 analysis and the R.C.M. 707 analysis must remain distinct. Just because a given period of time is properly excluded under R.C.M. 707(c) does not mean that the Government need not answer for that time period in the Article 10 inquiry; rather, the fact of proper exclusion under R.C.M. 707(c) has little to no bearing on whether the Government has used reasonable diligence under Article 10. *See Lazauskas*, 62 M.J. at 42 (“The resolution under R.C.M. 707 does not preclude a party from asserting responsibility for delay under Article 10, UCMJ, or the Constitution.”); *Mizgala*, 61 M.J. at 128-29 (“Article 10 and R.C.M. 707 are distinct, each providing its own speedy trial protection. The fact that a prosecution meets the 120-day rule of R.C.M. 707 does not directly ‘or indirectly’ demonstrate

that the Government moved to trial with reasonable diligence as required by Article 10.”); *Birge*, 52 M.J. at 211 (“[E]ven if the Government has complied with RCM 707 and the Sixth Amendment, the Government’s failure to proceed with ‘reasonable diligence’ would constitute a violation of Article 10.”); *Kossmann*, 38 M.J. at 261 (“Merely satisfying lesser presidential standards [of R.C.M. 707] does not insulate the Government from the sanction of Article 10.”); *Calloway*, 47 M.J. at 787 (“Even where delay is approved by the military judge, the Government must still show reasonable diligence under an Article 10, UCMJ, 10 U.S.C. § 810, analysis.”); *id.* (explaining that, unlike the R.C.M. 707(c) provision for excludable delay, “Article 10, UCMJ, 10 U.S.C. § 810, does not include a provision for a military judge to relieve the Government of the burden of proving it proceeded with reasonable diligence when an accused is in pretrial confinement.”). Because the protections of Article 10 are preeminent over those provided by R.C.M. 707, *Kossmann*, 38 M.J. at 261, R.C.M. 707 “does not act as a limitation on the rights afforded under Article 10.” *Mizgala*, 61 M.J. at 125. Therefore, regardless of those periods of delay properly excluded under R.C.M. 707(c), the Government still must show reasonable diligence under Article 10 for the entire period from “arrest or confinement” until trial. See *Cooper*, 58 M.J. at 59-60; *United States v. Simmons*, No. ARMY 20070486, 2009 WL 6835721, at *4 n.13 (A. Ct. Crim. App. Aug. 12, 2009) (unpub.) (“Article 10, UCMJ, however, does not address any specific excludable time periods; rather, the entire period of time from inception of confinement or arrest until trial is examined when considering whether the government exercised reasonable diligence.”); see also *Miller*, 66 M.J. at 573, 577 (finding no violation of R.C.M. 707 but finding a violation of Article 10).

104. Finally, there is only one remedy for a violation of Article 10: dismissal of the affected charges with prejudice. As the *Kossmann* Court has explained:

The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges. If it is concluded that the circumstances of the delay are sufficiently excusable or unavoidable as to permit a reinstitution of the charges, there is no violation of Article 10 in the first place. Where the circumstances of delay are not excusable, on the other hand, it is no remedy to compound the delay by starting all over.

38 M.J. at 262. Likewise, dismissal with prejudice is the only remedy available for a violation of a military accused’s Sixth Amendment speedy trial right. See R.C.M. 707(d)(1) (“The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial.”).

ARGUMENT

A. The Government Violated PFC Manning’s Speedy Trial Rights under R.C.M. 707

105. PFC Manning was placed into pretrial confinement on 29 May 2010. He was arraigned on 23 February 2012. Not counting the day of the triggering event but counting the day of arraignment, see R.C.M. 707(b)(1), 635 days passed from the imposition of restraint under R.C.M. 304(a)(4) until PFC Manning was “brought to trial” within the meaning of R.C.M.

707(a), *see id.* While several periods of delay were excluded by the Convening Authority under R.C.M. 707(c), many of these delays constituted abuses of discretion. When those improperly excluded periods are added back to the R.C.M. 707 speedy trial clock, it becomes clear that the Government has trampled upon PFC Manning's R.C.M. 707 speedy trial rights. Given the profound lack of diligence in the processing of this case from PFC Manning's pretrial confinement until PFC Manning's arraignment, this Court should dismiss all charges with prejudice.

1. Triggering Event under R.C.M. 707(a)

106. The speedy trial protections of R.C.M. 707(a) are triggered upon "the earlier of: (1) [p]referral of charges; (2) [t]he imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a). In this case, as the imposition of restraint predated the preferral of charges, the triggering date is the imposition of restraint under R.C.M. 304(a)(2)-(4). *See id.*

107. Here, the "imposition of restraint under R.C.M. 304(a)(2)-(4)," R.C.M. 707(a)(2), occurred when PFC Manning was placed in pretrial confinement on 29 May 2010. *See* R.C.M. 304(a)(4) (defining pretrial confinement). Therefore, the 120-day speedy trial clock began to run on 30 May 2010, the day after the imposition of restraint. *See* R.C.M. 707(b)(1) (providing that the date on which restraint is imposed shall not be counted for purposes of the speedy trial clock).

2. Uncontested Days Under the R.C.M. 707 Speedy Trial Clock

108. The earliest day that was excluded by the Convening Authority was 12 July 2010. *See* 12 October 2010 Excludable Delay Memorandum, Attachment 16 (excluding period from 12 July 2010 to 12 October 2010 under R.C.M. 707(c)). Therefore, the 43 day period from 30 May 2010, the day after PFC Manning was placed in pretrial confinement, *see* R.C.M. 707(b)(1), until 11 July 2010 counts against the R.C.M. 707(a) 120-day speedy trial clock.

109. The last day that was excluded by the Convening Authority was 15 December 2011. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60 (excluding period from 16 November 2011 to 15 December 2011 under R.C.M. 707(c)). Additionally, it appears that LTC Almanza excluded the 10 days between 24 December 2011 and 2 January 2012. *See* 4 January 2012 Email from LTC Almanza to then-CPT Fein, Attachment 58; Chronology of Article 32 IO, Attachment 59, at 4.⁷ Therefore, the 8-day period from 16 December 2011 until 23 December 2011 unquestionably counts against the R.C.M. 707(a) speedy trial clock. Finally, the 52-day period from 3 January 2012 to PFC Manning's arraignment on 23 February 2012, *see* R.C.M. 707(b)(1) ("The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904."), also counts against the R.C.M. 707(a) speedy trial clock.

⁷ On 4 January 2012, LTC Almanza purported to "exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when [LTC Almanza] did not work on the Article 32 Investigation." 4 January 2012 Email from LTC Almanza to then-CPT Fein, Attachment 58. However, LTC Almanza did not specify how many days, if any, he actually excluded. LTC Almanza's chronology seems to indicate that he did not work on the Article 32 investigation for a period of 10 days within the 23 December 2011–3 January 2012 date range. Specifically, it appears that LTC Almanza did not work on the Article 32 investigation from 24 December 2011 to 2 January 2012. *See* Chronology of Article 32 IO, Attachment 59, at 4.

110. Taken together, the 43 days from 30 May 2010 to 11 July 2010, the 8 days from 16 December 2011 to 23 December 2011, and the 52 days from 3 January 2012 to 23 February 2012 add up to 103 days. Therefore, the Government cannot dispute that 103 days count against the 120-day speedy trial clock of R.C.M. 707(a).

3. Uncontested Exclusions under R.C.M. 707(c)

111. Other than the 103 days that unquestionably count against the R.C.M. 707(a) speedy trial clock, the Convening Authority and Article 32 IO excluded under R.C.M. 707(c) the rest of the 635 days between the day after PFC Manning was placed in pretrial confinement and the day he was arraigned, *see* R.C.M. 707(b)(1). The Defense challenges many of those exclusions, which totaled 532 days, as an abuse of the Convening Authority's discretion. *See* Argument, Part A.4, *infra*. However, the Defense does not challenge some of the Convening Authority's excludable delay decisions.

112. The Defense does not dispute the propriety of the Convening Authority's decision to exclude the period of 11 August 2010 until 12 October 2010. *See* 12 August 2010 Excludable Delay Memorandum, Attachment 9; 25 August 2010 Excludable Delay Memorandum, Attachment 11; 12 October 2010 Excludable Delay Memorandum, Attachment 16.⁸ The Government apparently began acting on the Defense's several requests for a R.C.M. 706 Board only after the Defense's fourth request on 11 August 2010. *See* 11 August 2010 Defense Request, Attachment 8. The Defense then made a number of requests related to the upcoming R.C.M. 706 Board's evaluation. *See* 25 August 2010 Defense Request for Appointment of Forensic Psychiatrist Expert, Attachment 10; 26 August 2010 Defense Request for Adoption of Procedures to Safeguard Classified Information, Attachment 12; 3 September 2010 Defense Request for Appropriate Security Clearances for Defense Team and Access for PFC Manning, Attachment 13.

113. For similar reasons, the Defense does not challenge the Convening Authority's decision to exclude the following periods under R.C.M. 707(c): from 12 October 2010 to 10 November 2010, *see* 10 November 2010 Excludable Delay Memorandum, Attachment 17; from 10 November 2010 to 17 December 2010, *see* 17 December 2010 Excludable Delay Memorandum, Attachment 19; from 17 December 2010 to 14 January 2011, *see* 14 January 2011 Excludable Delay Memorandum, Attachment 21; and from 14 January 2011 to 15 February 2011, *see* 15 February 2011 Excludable Delay Memorandum, Attachment 23.

114. On 3 February 2011, the Convening Authority issued an order directing the R.C.M. 706 board to resume its examination into the mental capacity and mental responsibility of PFC Manning. *See* 3 February 2011 Order to Resume Conducting Sanity Board, Attachment 22, at 1.

⁸ The Defense does contend that the portion of the Convening Authority's 12 October 2010 excludable delay memorandum that excluded the period of 12 July 2010 up until 10 August 2010, before the Government had taken any action on the Defense's first three requests for a R.C.M. 706 Board, was an abuse of discretion. *See* Argument, Part A.4.b, *infra*. Therefore, to clarify the statement in the text preceding this footnote, the Defense reiterates that it only concedes the validity of the Convening Authority's 12 October 2010 excludable delay memorandum to the extent that it excluded the period from 11 August 2010 until 12 October 2010.

The order set a suspense date of 3 March 2011, four weeks from the date of the order. *See id.* at 6. Therefore, the Defense also does not contest that portion of the Convening Authority's 18 March 2011 Excludable Delay Memorandum which excludes the period from 15 February 2011 to 3 March 2011, the suspense date set in the 3 February 2011 Order to Resume Conducting Sanitary Board. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26.⁹

115. To recap, then, this Motion does not purport to challenge the Convening Authority's exclusion of the time period from 11 August 2010 to 3 March 2011, a period of 205 days.

4. Improper Exclusions under R.C.M. 707(c)

116. Apart from the periods of excluded delay that the Defense does not challenge, the Convening Authority or the Article 32 IO excluded several periods, totaling 327 days, under R.C.M. 707(c). Each of these many exclusions constituted an abuse of discretion.

117. Most clearly, LTC Almanza's exclusion of the 10-day period from 24 December 2011 to 2 January 2012 constituted a patent abuse of discretion. LTC Almanza failed to state the time period covering the delay as well as his reasons for finding the delay to be reasonable. The exclusion decision – a one sentence email – failed to even comply with the Convening Authority's directions. More problematic, the exclusion has absolutely no legal support whatsoever. Because it is such an egregious abuse of discretion, this 10-day exclusion is discussed first.

118. The Convening Authority was hardly better at fulfilling its role under R.C.M. 707(c). With respect to each of the Convening Authority's many exclusions, the Convening Authority abused its discretion. The Convening Authority abjured its responsibility to make an independent determination of the reasonableness of each requested period of delay and instead became a rubber stamp for the Government's repeated requests for delay. Under the speedy trial protections of R.C.M. 707, such a wholesale abdication of responsibility cannot be countenanced. When even one of the improperly excluded time periods is added to the uncontested days that count against the speedy trial clock, *see* Argument, Part A.2, *supra*, and the 10 days so obviously erroneously excluded by LTC Almanza, the R.C.M. 707(a) 120-day speedy trial clock has been violated. Each of the Convening Authority's abuses of discretion is discussed in chronological order.

a. LTC Almanza's Exclusion

119. The most glaring example of an abuse of discretion in excluding a period from the R.C.M. 707 speedy trial clock occurred on 4 January 2012 when LTC Almanza purported to exclude, in a one sentence email, the days between 23 December 2011 and 3 January 2012 when he did not work on the Article 32 investigation. 4 January 2012 Email from LTC Almanza to then-CPT Fein, Attachment 58. This exclusion is completely unsupportable on both legal and factual grounds.

⁹ However, the Defense does challenge the Convening Authority's decision to exclude the period beyond the original 3 March 2011 suspense date. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26 (excluding from 15 February 2011 to 18 March 2011); *see also* Argument, Part A.4.c, *infra*.

120. The entirety of this “exclusion” is the following sentence in a 4 January 2012 email from LTC Almanza to then-CPT Fein: “I will exclude as a reasonable delay the days between 23 December 2011 and 3 January 2012 when I did not work on the Article 32 investigation.” *Id.* LTC Almanza did not even specify which days within this time period were excluded or, indeed, if any days were excluded at all. It is not until one looks to LTC Almanza’s chronology that one discovers that the days that LTC Almanza was ostensibly referring to are the 10 days from 24 December 2011 to 2 January 2012. *See* Chronology of Article 32 IO, Attachment 59, at 4 (listing activity on 23 December 2011 and 3 January 2012 but listing no activity between 24 December 2011 and 2 January 2012). The failure to reduce the exclusion decision to writing along with the dates covering the delay violated both the Convening Authority’s exclusion decisions and the proper procedure for granting delays under R.C.M. 707(c). *See* R.C.M. 707(c) discussion (“[T]he decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.” (emphasis supplied)); LTC Almanza Appointment Memorandum, Attachment 7, at 1 (requiring all approvals or denials of delay requests to be in writing); Special Instructions for Investigation under Article 32, Attachment 57, at 3 (same).

121. Equally problematic, LTC Almanza provided no reasons whatsoever to support the exclusion. This lack of reasons alone makes LTC Almanza’s exclusion an abuse of discretion. *See* R.C.M. 707(c) discussion (“[T]he decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.” (emphasis supplied)). It is impossible to tell what it was about the time period in which LTC Almanza did not work on this case that made him feel that excluding these 10 days was reasonable. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

122. Moreover, there is absolutely no legal authority for a “federal holidays and weekends” exclusion or a “time the Government didn’t work on the case” exclusion under R.C.M. 707(c). The rule itself contains no such provision. Moreover, the discussion section to R.C.M. 707(c), quoted in full above, *see* Legal Framework, Part A, *supra*, lists several situations where exclusions might be appropriate. The discussion section neither states nor even implies that weekend and holiday time or time where the Article 32 IO simply doesn’t feel like working on the case might be excluded under R.C.M. 707(c). Additionally, the Defense is aware of no case that contains even a scintilla of support for a “federal holidays and weekends” exclusion or a “time the Government didn’t work on the case” exclusion under R.C.M. 707(c).

123. This lack of legal authority is unsurprising, as it plainly comports with common sense, something that has been lacking in the Government’s camp in the 845 days since this case began. If time can be excluded under federal holidays and weekends, what else can be excluded along the same thought process? Does R.C.M. 707(c) make room for exclusion of sick days? Vacation days? LTC Almanza wasn’t computing billable hours for a law firm in his 4 January 2012 email; he was shaving days off of the R.C.M. 707 120-day speedy trial clock, one of the

many sources of PFC Manning's fundamental right to a speedy trial. See *Lazauskas*, 62 M.J. at 41; *Mizgala*, 61 M.J. at 124. While LTC Almanza was taking a break from the Article 32 investigation for the "federal holidays and weekends," PFC Manning remained in pretrial confinement, where he had been for the past 586 days. The notion that the Government can exclude from the R.C.M. 707 speedy trial clock, a provision designed to ensure that the Government diligently processes a case against an accused, periods of time in which the Government simply did not work on the case is simply abhorrent to the purposes behind the many speedy trial protections given to a military accused.

124. Finally, if more were needed to show that this exclusion constitutes an abuse of discretion, LTC Almanza's exclusion was an improper ex parte exclusion. The discussion section to R.C.M. 707(c) states that "[p]retrial delays should not be granted ex parte." R.C.M. 707(c) discussion. LTC Almanza neither requested nor waited for a Defense response to the Government request for an exclusion; he simply granted the Government's request the very next day. Such an ex parte exclusion cannot be upheld by this Court.

125. For these reasons, the 10 days excluded by LTC Almanza represent a gross abuse of discretion. Therefore, those 10 days should be added back to the R.C.M. 707(a) speedy trial clock.

b. 12 July 2010 to 10 August 2010

126. The Convening Authority abused its discretion in excluding the period from 12 July 2010 to 10 August 2010, since the Government had made no apparent progress on the Defense's several requests for a R.C.M. 706 Board until after the Defense's fourth request on 11 August 2010.

127. To be sure, the Defense requested the R.C.M. 706 Board, and in its 11 August 2010 request (its fourth such request) the Defense stated that it "maintains responsibility for this delay because Captain Paul Bouchard initially requested the inquiry from PFC Manning's previous chain of command." 11 August 2010 Defense Request, Attachment 8. However, that statement was made under the assumption that the R.C.M. 706 Board would be conducted in a timely manner. Because the Government did nothing between the period of 12 July 2010, when the Defense's second request for a R.C.M. 706 Board was made, and 11 August 2010, when the Defense's fourth request for a R.C.M. 706 Board was made, the responsibility for delay discussed in the Defense's fourth request was prospective only, ranging from the date of the request until the date of the R.C.M. 706 Board's completion.

128. On 12 August 2010, the Convening Authority approved the Defense's fourth request and ordered that the period from 11 August 2010 until the R.C.M. Board's completion was excludable defense delay. 12 August 2010 Excludable Delay Memorandum, Attachment 9.

129. However, on 12 October 2010, the Convening Authority reached back an additional month and excluded the period from 12 July 2010 to 12 October 2010. 12 October 2010 Excludable Delay Memorandum, Attachment 16. The excludable delay memorandum stated the following under the heading "Basis of Delay:"

The above delay is based on the following defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities (OCA) reviews of classified information.
- b. Defense request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
- c. Defense Request for Appointment of Expert with Expertise in Forensic Psychiatry to Assist the Defense, dated 25 August 2010 (enclosed).
- d. Defense Request for Delay in the RCM 706 Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010 (enclosed).
- e. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- f. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- g. Preliminary Classification Review of the Accused's Mental Impressions, dated 17 September 2010 (enclosed), and Superseding Order, dated 22 September 2010 (enclosed).
- h. Defense Response to the Preliminary Classification Review of the Accused's Mental Impressions, dated 28 September 2011.

Id.

130. The decision to exclude the period from 12 July 2010 to 10 August 2010 was an abuse of discretion. The Convening Authority offered no actual reasons for why the period from 12 July 2010 to 10 August 2010 should be excluded. All of the "reasons" articulated by the Convening Authority, with the exception of "b" above, occurred after 11 August 2010. Therefore, none of these reasons can support a decision excluding the period that predated the occurrence of these reasons.

131. Moreover, the Convening Authority simply identified in reason "b" above the fact that the second and third Defense requests for the R.C.M. 706 Board were made. But the mere fact that these requests were made does not justify excluding the period immediately following them. To be a reasonable delay, there would need to be some action taken with respect to these requests in order to justify excluding the period from 12 July 2010 to 10 August 2010. The Convening Authority identified no such action in the "Basis of Delay" section of its 12 October 2010 excludable delay memorandum. That is not surprising, however, since it appears that the Government took no action on the Defense's earlier R.C.M. 706 board request until after its

fourth request on 11 August 2010. As far as the Defense can tell, the Government did nothing for the 17-day period from 13 July 2010, the day after the second Defense request for a R.C.M. 706 Board was made, and 30 July 2010, when PFC Manning was transferred to Quantico. *See* Facts, Part A.4, *supra*. Additionally, the only Government action taken between 30 July 2010 and 11 August 2010 appears to be the appointment of LTC Almanza as the new Article 32 IO. Nothing was done on the Defense's R.C.M. 706 Board requests. Indeed, the whole reason that the Defense was forced to make its fourth R.C.M. 706 Board request in the span of one month was because the Government had done nothing on the prior three requests.

132. Therefore, because the Convening Authority failed to state the reasons that justified excluding the period from 12 July 2010 to 10 August 2010 (and because no such reasons existed), it abused its discretion in excluding this period. *See* R.C.M. 707(c) discussion (“[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing.” (emphasis supplied)). The Convening Authority failed to state why the delay that was being excluded was reasonable. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

133. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 12 July 2010 and 10 August 2010. When these 30 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

c. 4 March 2011 to 18 March 2011

134. The Convening Authority also abused its discretion in excluding the period from 4 March 2011 to 18 March 2011. Dr. Sweda's reasons for delay of the R.C.M. 706 Board's suspense date were inadequate, and the Convening Authority offered no explanation whatsoever of why the Board's request justified the delay.

135. On 14 March 2011, almost two weeks after the original R.C.M. 706 Board's suspense date, Dr. Sweda requested an extension of the suspense date to 29 April 2011. *See* 14 March 2011 Memorandum Requesting Extension for R.C.M. 706 Board, Attachment 24. Dr. Sweda offered only the following paragraph as the basis for his extension request:

The evaluators are coordinating suitable dates and times for the final evaluation session to take place. This involves multiple parties. Additionally, the final interview will take place at a SCIF and this has resulted in the consumption of extra time for this aspect of the evaluation to be coordinated. We anticipate that the final date for the evaluation should take place in the first ten days of April 2011 and are expecting that this delay will be confirmed today.

Id.

136. Four days later, the Convening Authority approved Dr. Sweda's extension request. *See* 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25. The entirety of the Convening Authority's approval was stated in the following four sentences: "I have reviewed the request for an extension of the RCM 706 Sanity Board for PFC Manning. The request is: (signature) approved. The Sanity Board will be completed no later than 16 April 2011. Any other extension of time must be submitted through the trial counsel to me for approval." *Id.* That same day, the Convening Authority also issued an excludable delay memorandum. *See* 18 March 2011 Excludable Delay Memorandum, Attachment 26. The "Basis of Delay" section of this memorandum stated in its entirety:

The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities' (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
- d. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- f. RCM 706 Sanity Board Extension Request, dated 14 March 2011 (enclosed).

Id.

137. There are several problems with the Convening Authority's approval of the extension request and exclusion of the time period between 4 March 2011 and 18 March 2011. First, neither Dr. Sweda in his extension request nor the Convening Authority in its approval memorandum or excludable delay memorandum even discussed the fact that the R.C.M. 706 Board had flouted the Convening Authority's original suspense date of 3 March 2011. No mention was made by either Dr. Sweda or the Convening Authority of why the R.C.M. 706 Board had waited almost two weeks after the expiration of that suspense date to seek an extension of it. The omission of a timely extension request indicates that the reasons offered by Dr. Sweda and the "basis of delay" identified by the Convening Authority were merely post hoc rationalizations for the R.C.M. 706 Board's failure to timely complete its evaluation.

138. Moreover, the Convening Authority did not actually articulate any reasons why the R.C.M. 706 Board's request should be granted. In its approval memorandum, the Convening Authority

literally gave no reasons why the request should be granted. See 18 March 2011 Memorandum Approving R.C.M. 706 Board's Extension Request, Attachment 25 (stating merely that "I have reviewed the request for an extension of the RCM 706 Sanitary Board for PFC Manning. The request is: (signature) approved."). Similarly, in its excludable delay memorandum of the same date, the Convening Authority offered no explanation of why the extension request justified the delay. The mere fact that the request was made cannot establish that it was reasonable to grant the request. And yet, from the paucity of the Convening Authority's explanation, that is the only possible conclusion that can be drawn as to the Convening Authority's thought process. Therefore, because the Convening Authority offered no explanation of the reasons justifying the delay as reasonable delay, the Convening Authority abused its discretion in excluding the time period from 4 March 2011 to 18 March 2011 from the R.C.M. 707 120-day speedy trial clock. See R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing." (emphasis supplied)); *Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same); cf. *Miller*, 66 M.J. at 574 (remarking, in the context of an Article 10 analysis, "Lastly, and perhaps most importantly, the Government presented no evidence as to what action was taken to expedite the [R.C.M. 706] examination, particularly when it began to lag.").

139. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 4 March 2011 and 18 March 2011. When these 15 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

d. 18 March 2011 to 22 April 2011

140. The Convening Authority also abused its discretion in excluding the period from 18 March 2011 to 22 April 2011 as excludable delay under R.C.M. 707(c). The R.C.M. 706 Board's second request for an extension offered even fewer reasons than its first request, and the Convening Authority once again offered no real explanation of the justification for finding that the period excluded was reasonable. Additionally, the circumstances surrounding the 22 April 2011 excludable delay memorandum raise substantial questions as to whether the Convening Authority gave the requisite "independent determination" of whether there was in fact good cause for the requested delay.

141. On 15 April 2011, the day before the extended suspense date for the completion of the R.C.M. 706 Board's evaluation, Dr. Sweda requested yet another extension of the suspense date. See 15 April 2011 Memorandum Requesting Extension for Sanitary Board, Attachment 27. Dr. Sweda requested an extended suspense date of close of business on 22 April 2011. See *id.* Dr. Sweda offered only the following statement of reasons for the second extension request: "The Board has been diligently working on completion of the long report. We are nearing finalization

of the report, but have limited availability to meet as a full board to discuss the report. This is because of conflicting schedules and demands of the three board members.” *Id.* The Convening Authority approved, without Defense input, Dr. Sweda’s request later that same day. *Id.*

142. The R.C.M. 706 Board submitted its report on 22 April 2011. *See* 22 April 2011 706 Short Report, Attachment 28. The Convening Authority issued another excludable delay memorandum on the same day that the R.C.M. 706 Board submitted its report. *See* 22 April 2011 Excludable Delay Memorandum, Attachment 29. This memorandum excluded the period from 18 March 2011 to 22 April 2011. *Id.* at 1. The “Basis of Delay” section of this memorandum was quite familiar; it was a carbon copy of the 18 March 2011 excludable delay memorandum’s “Basis of Delay” section, except that the R.C.M. 706 Board’s second extension request was added to the list. *See id.* at 2. In full, the 22 April 2011 excludable delay memorandum’s “Basis of Delay” section provided as follows:

The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities’ (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 18 July 2010 (enclosed).
- d. Defense Request for Results of the Government’s Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- f. RCM 706 Sanity Board Extension Request, dated 14 March 2011 (enclosed).
- g. RCM 706 Sanity Board Extension Request, dated 15 April 2011 (enclosed).

Id. Moreover, this excludable delay memorandum was not actually signed by the Convening Authority. Rather, it was signed for the Convening Authority by SFC Monica Carlile. *Id.* at 2. SFC Carlile is a paralegal for the Government. There are several reasons why the Convening Authority abused its discretion in excluding the time period from 18 March 2011 until 22 April 2011 under R.C.M. 707(c).

143. First, the Board’s only other reason for the second extension request was the “limited availability to meet as a full board to discuss the report . . . because of conflicting schedules and demands of the three board members.” 15 April 2011 Memorandum Requesting Extension for Sanity Board, Attachment 27. This reason is entirely illegitimate. Reasons like inadequate staffing, other demands, and conflicting schedules of Board members are nothing more than the “realities of military criminal practice.” *Thompson*, 68 M.J. at 313 (“As a general matter, factors

such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision[.];”); see *United States v. Johnson*, 48 C.M.R. 9, 9 (C.M.A. 1973) (explaining that a “generalized claim of inadequate personnel and administrative convenience” are insufficient excuses for speedy trial delay); *United States v. Marshall*, 47 C.M.R. 409, 412-13 (C.M.A. 1973) (holding that “manpower shortages” and having “too few officers assigned to the preparation of the pretrial advice” were insufficient reasons for speedy trial delay); *United States v. Mickla*, 29 M.J. 749, 752 n.2 (A.F.C.M.R. 1989) (“Despite a heavy workload or absence of a full staff, the Government is still responsible for time delays.”); *United States v. Bell*, 17 M.J. 578, 580 (A.F.C.M.R. 1983) (“The only explanation offered by the prosecution was, in essence, that the office of the staff judge advocate was very busy. This is not an acceptable explanation for a delay.”). While the three members of the R.C.M. 706 Board were taking time coordinating their conflicting schedules, PFC Manning remained confined at Quantico in conditions tantamount to solitary confinement. See Appellate Exhibit 258, at 35-37. Therefore, because the Board’s second extension request was based solely on the illusory justification of the length of the report and the illegitimate justification of busy schedules, the Board presented the Convening Authority with no valid reason to grant the extension request.

144. In addition to the inadequate reasons for the extension request offered by the R.C.M. 706 Board, the Convening Authority also failed to adequately explain the reasons for the exclusion and how those articulated “reasons” justified the delay as reasonable. Additionally, as it had done before, the Convening Authority simply identified, without any elaboration whatsoever, the OCA classification review process, various Defense requests, and the R.C.M. 706 Board’s extension requests. But the mere fact that the Board made two requests does not in itself make the delay reasonable under R.C.M. 707(c). Apart from simply identifying the fact that the requests were made (which in itself provides no justification for the conclusion that the requested delay was reasonable), the Convening Authority gave no reasons why the second extension of the suspense date was justified. See R.C.M. 707(c) discussion (explaining that any delay under R.C.M. 707(c) must be reasonable); *Savard*, 2010 WL 4068964, at *3 (same); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same); cf. *Miller*, 66 M.J. at 574. Indeed, since the suspense date had already been extended once, one would suspect that the Convening Authority would at least require more of a showing of good cause, or at least itself identify some reasons establishing such good cause, before a second extension was granted. The fact that the Convening Authority neglected to even offer the most minimal explanation of the reasons supporting the delay as reasonable leads to one of two conclusions: either there were no adequate reasons to support the reasonableness of delay, so that the Convening Authority thought it could just get a pass by identifying requests for extensions without more; or the Convening Authority had by then abdicated its responsibility to determine the reasonableness of the delay and had instead become a rubber stamp for any Government requested delay. Neither conclusion can justify the Convening Authority’s failure to identify the reasons why the delay was reasonable. See R.C.M. 707(c) discussion (“[T]he decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.” (emphasis supplied)).

145. Furthermore, the fact that the request was signed for the Convening Authority by a paralegal of the Government Criminal Law shop shows that the Convening Authority abdicated its responsibility to make an independent determination of the existence of good cause for the delay. *See Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. It is outrageous that either the Government or the Convening Authority thought it appropriate for an agent of the Government prosecuting the accused to sign for the apparently “neutral” Convening Authority. Indeed, SFC Carlile’s signature supports one sole inference: that the Convening Authority had by 22 April 2011 simply become a rubber stamp for the Government’s requested delays.

146. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 18 March 2011 and 22 April 2011. When these 36 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning’s R.C.M. 707 speedy trial rights.

e. 22 April 2011 to 12 May 2011

147. The Convening Authority also abused its discretion in approving the Government’s request for delay and in excluding the period from 22 April 2011 to 12 May 2011. The Government’s stated reasons did not sufficiently explain why the delay requested was reasonable. Additionally, the Convening Authority similarly failed to explain the reasons that made the excluded period of delay a reasonable one.

148. The Government’s first of eight requests for delay in the Article 32 hearing was made on 25 April 2011. *See* 25 April 2011 Government Request for Delay, Attachment 30. The Government related that this delay was necessary for it to receive consent from all of the OCAs to release discoverable classified evidence and information to the Defense. *See id.* The Government provided the following reasons for its delay request:

Since 17 June 2010, the United States has been diligently working with all of the departments and agencies that originally classified the information and evidence sought to be disclosed to the defense and the accused However, because of the special circumstances of this case, including the voluminous amounts of classified digital media containing multiple equities and the subsequent discovery of more information helpful to both the United States and the accused, more time is needed for executive branch departments and agencies to obtain the necessary consent from their OCA or authorizing official.

*Id.*¹⁰

¹⁰ It is unclear what “subsequent discovery” the Government was referring to that was apparently “helpful” to the accused. The Defense did not receive any discovery during this period that was “helpful” to the accused. Accordingly, the Defense believes that the Government misstated the reasons for delay in order to make it appear that the Government was acting in an even-handed manner in pursuing discovery.

149. The Defense opposed this delay the next day, 26 April 2011. *See* 26 April 2011 Defense Response to Government Request for Delay, Attachment 31. In order to minimize any further delay, the Defense requested that the Government: provide substitutes for or summaries of the relevant classified documents; allow the Defense to inspect all unclassified documents within the Government's control that were material to the preparation of the Defense; and ensure that the Defense has equal access to CID and other law enforcement witnesses by making available any requested witnesses. *Id.* at 1. Finally, the Defense requested that any further delay be credited to the Government. *Id.* at 2.

150. The Convening Authority in effect approved the Government's request for delay on 12 May 2011 when it issued an excludable delay memorandum excluding the period from 22 April 2011 to 12 May 2011 under R.C.M. 707(c). 12 May 2011 Excludable Delay Memorandum, Attachment 32. The memorandum's "Basis of Delay" section provided in full as follows:

The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities' (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- e. Government Request for Delay of Article 32 Investigation, dated 25 April 2011 (enclosed).

Id. The Convening Authority's decision to exclude this time period is unsupportable and thus constitutes an abuse of discretion.

151. As an initial matter, by its own admission, the Government had 313 days from 17 June 2010, when it apparently began to work with the OCAs, to 25 April 2011, when it made its first request for delay, in which to have the OCAs complete the classification review process and to obtain the necessary consent to disclose the relevant information. *See* 25 April 2011 Government Request for Delay, Attachment 30 (explaining that the Government had been "diligently working with" the OCAs since 17 June 2010).¹¹ Moreover, by 12 May 2012, the Government had an additional 17 days in which to complete the process. The Government offered no satisfactory explanation of why it was unable to complete the classification review process in 330 days from the date that it supposedly started working with the OCAs and 349 days after PFC Manning was placed into pretrial confinement. The only explanations that even

¹¹ The Government did not explain why it had waited until 17 June 2010, 19 days after PFC Manning was placed in pretrial confinement on 29 May 2010, to begin working with the OCAs. When that period is added to the 313 days from 17 June 2010 to 25 April 2011, the Government had 332 days in which to complete the OCA process.

potentially address the Government's inability to complete the OCA classification review process are "the voluminous amounts of classified digital media containing multiple equities and the subsequent discovery of more information helpful to both the United States and the accused[.]" *Id.*

152. But neither of these "explanations" satisfactorily explains the substantial delay that had already occurred. Even if the Government is correct that voluminous amounts of classified digital media are involved in this case, the OCA classification reviews are anything but voluminous. Of the ten OCA classification reviews provided to the Defense by the Government, only three were over twelve pages in length. Six of the classification reviews were four pages or less in length. The Government's explanation does not address why the classification reviews of "voluminous amounts of classified digital media," if as lengthy as the Government asserts, yield as little as a few pages in results. Additionally, at least two of these classification reviews were completed before the Government's first request for delay of the Article 32 hearing. Even these completed reviews, however, were not disclosed to the Defense until late October or early November, many months after the Government's first request for delay and many more after their completion. The Government offered no reason for the delay in producing these completed classification reviews.

153. If the Government meant to imply that the process itself of coordinating with the OCAs was a time-consuming one, it offered no reasons why this was so. The mere fact that the Government needed to coordinate with another governmental agency does not in itself establish good cause for delay. *See United States v. Kuelker*, 20 M.J. 715, 716-17 (N.M.C.M.R. 1985). In *Kuelker*, the Government argued that a period of 87 days from the Government's subpoena of U.S Treasury checks then in possession of the Treasury Department to the Government's receipt of those checks should be excluded under R.C.M. 707(c). *Id.* at 716-17. The Navy-Marine Court of Military Review disagreed, holding that "the need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'" *Id.* at 716. Any other conclusion, the *Kuelker* Court reasoned, would lead to the R.C.M. 707(c) exception devouring the R.C.M. 707(a) rule. *Id.* at 717.

154. To be sure, the OCA classification review process is likely more involved than the subpoena of Treasury checks in *Kuelker*. But the Government provided no detail in its first request regarding the coordination between it and the various OCAs, other than to say it was "diligently working" with them. Therefore, the Government offered nothing about the particular coordination between it and the OCAs, other than the fact of the coordination itself, to justify the delay. Accordingly, the rule in *Kuelker* is fully applicable to the Government's generalized claim of the need to coordinate with other agencies to obtain critical information, to the extent that the Government's explanation in its first request for delay even made such a claim.

155. As far as the Government's subsequent discovery of helpful information goes, it offered no explanation why it was not able to discover this information in the 313 days between 17 June 2010 and its first request for delay. Moreover, the Defense remains skeptical of whether the Government actually found information helpful to PFC Manning, since the Government has only just recently provided the Defense with most of *Brady* material turned over thus far.

156. Additionally, the Government's explanations of the need for delay are far too conclusory to be helpful to the Convening Authority in determining whether the requested delay was reasonable. The Government offers no explanation of what had been done in the classification review process up to the date of its first request for delay and what still needed to be done in the process. Certainly the statement that the Government has been "diligently working" with the OCAs is both too self-serving and too lacking in detail to offer any insight into where the classification review process stood on 25 April 2011. Nothing else in the Government's request for delay makes up for the Government's utter lack of detail in its two explanations for the need for delay. See *United States v. Facey*, 26 M.J. 421, 425 (C.M.A. 1988) ("Since the Government has the responsibility of establishing its entitlement to any deductions from the period for which it would otherwise be accountable under R.C.M. 707, any deficiency of evidence must be laid at its door.")

157. In the end, therefore, it seems that the Government requested delay simply because it was not ready to proceed. The then-Court of Military Appeals cautioned that such a justification for delay (i.e. we need to delay the proceedings because we are not ready to proceed) is unacceptable: "If, however, a recess or continuance is requested solely because the Government is not prepared to go forward with evidence on the merits, such time should not be excluded from its speedy-trial accountability." *United States v. Ramsey*, 28 M.J. 370, 373 (C.M.A. 1989). And yet that is precisely what appears to have happened here.

158. Moreover, the Convening Authority appears to have done nothing on its own to fulfill its responsibility to conduct an independent determination as to the good cause for or reasonableness of the delay. See *Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. Based on the lack of detail provided by the Government, the Convening Authority should have at least made some effort to set forth the reasons why the delay being excluded was reasonable. But, as usual, the Convening Authority relied on the practice of citing various requests as the "Basis of Delay" without providing any elaboration on why those requests made the excluded period of delay a reasonable one. It is not at all clear how the Defense's request for the results of the OCA classification reviews and for appropriate security clearances, each made more than seven and a half months before the Government's 25 April 2011 request for delay, contributed to any delay in the Government's classification review, which was still ongoing at that point. Additionally, it is not clear from the Convening Authority's memorandum what about the Government's request made the excluded period of delay reasonable. The mere fact that the request was made cannot itself establish the reasonableness of the requested delay. Perhaps we would know the Convening Authority's thought process if he explained that thought process. Because the Convening Authority limited his discussion of the basis for the delay to a laundry list of requests and did not provide the reasons why these requests made the excluded delay reasonable, we cannot know what led the Convening Authority to conclude that the delay was reasonable. Therefore, the Convening Authority abused his discretion in not articulating the reasons supporting his conclusion that the delay was reasonable. See R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing." (emphasis supplied)); *Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL

2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

159. Even more problematic, the Convening Authority offered no consideration of the Defense's alternatives to delay, namely, the provision of summaries of or substitutions for the classified material so that the Article 32 hearing could commence as soon as possible. Indeed, nothing in the Convening Authority's excludable delay memorandum even indicates that the Convening Authority consulted the Defense's memorandum opposing the delay. The Convening Authority's refusal to even acknowledge the possibility of other options to delay of the Article 32 is further evidence that the Convening Authority had by then abdicated its responsibility to make an independent determination of the reasonableness of the delay and had become a rubber stamp for the Government's many delay requests. *See* Argument, Part A.4.d, *supra* (discussing further evidence of Convening Authority being a rubber stamp for the Government's delay requests).

160. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 22 April 2011 to 12 May 2011. When these 17 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

f. 12 May 2011 to 17 June 2011

161. The Convening Authority also abused his discretion in approving the Government's second request for delay and excluding the period of 12 May 2011 to 17 June 2011. The Government's stated reasons did not sufficiently explain why further delay was reasonable. Additionally, the Convening Authority similarly failed to explain the reasons that made the excluded period of delay a reasonable one.

162. On 22 May 2011, the Government submitted its second request for delay of the Article 32 hearing, relating once again that delay was necessary in order to obtain consent from the OCAs. *See* 22 May 2011 Government Request for Delay, Attachment 33. The "Update" section of the Government's request reads in full as follows:

The prosecution is continuing to work with relevant Original Classification Authorities (OCAs) to obtain consent to disclose classified evidence and information to the defense along with receiving completed classification reviews. In anticipation of OCA consent, CID began making copies of classified digital media and evidence for disclosure to the defense. Additionally, the prosecution learned that several exhibits and documents in the unclassified CID case file require authorization to disclose apart from any classified information. The U.S. Attorney's Office for the Eastern District of Virginia is working to obtain that authorization on behalf of the prosecution from multiple federal districts within the United States.

Id. (emphasis in original). Two days later, the Defense sent an email opposition to the Government's request for delay. See 24 May 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 34. The Defense relied on its position from the 26 April 2011 memorandum opposing the Government's first request for delay. *Id.* The Defense also requested that any additional delay be credited to the Government. *Id.*

163. On 17 June 2011, the Convening Authority excluded the period from 12 May 2011 to 17 June 2011 as excludable delay under R.C.M. 707(c). See 17 June 2011 Excludable Delay Memorandum, Attachment 35. The "basis" for this exclusion was the exact same basis identified in the Convening Authority's May excludable delay memorandum, except now the Government's 22 May 2011 request for delay replaced the 25 April 2011 request for delay that had been listed in the 12 May 2011 excludable delay memorandum. See *id.* Specifically, this memorandum's "Basis of Delay" section provided in full as follows:

The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities' (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- e. Government Request for Delay of Article 32 Investigation, dated 22 May 2011 (enclosed).

Id.

164. There are several reasons why the Convening Authority's exclusion of the period from 12 May 2011 to 17 June 2011 was an abuse of discretion. First, the Government offered no explanation of why the delay was reasonable or of where the Government stood in the classification review process. As of the date of its request, 340 days had passed since the Government began working with the OCAs, and 359 days had passed since PFC Manning was first placed into pretrial confinement. What explanation did the Government provide of where it was in the classification review process, which had at that point been ongoing for at least 340 days? It was "continuing" to work with the OCAs. 22 May 2011 Government Request for Delay, Attachment 33. It had "beg[u]n making copies" of some of the classified material. *Id.* And the United States Attorney's Office was "working" to obtain necessary authorization to

disclose unclassified portions of the CID case file.¹² These three facts told the Convening Authority nothing about where the classification review process was then positioned. What specifically had already been done? How much had the various OCAs done in their respective classification reviews, and how much more did each OCA need to do before the classification review was complete? The Government didn't say. Instead, it unhelpfully related that it was "continuing" to work with the OCAs. *Id.* Without knowing how much has been done and what still needed to be done in the classification review process, the Convening Authority was unable to make an informed determination of whether the requested period of delay was reasonable. *See Facey*, 26 M.J. at 425.

165. Additionally, as mentioned above, *see* Argument, Part A.4.e, *supra*, the length of the completed OCA classification reviews casts further doubt on the Government's contention that it was working diligently in obtaining consent from the OCAs. The Government offered no explanation of the details of the classification review process, and when that lack of detail is juxtaposed with the brevity of the completed classification reviews, the Government's conduct from 17 June 2010 to 22 May 2011 seems anything but reasonably diligent. Furthermore, the Government cannot simply hide behind the need to coordinate with other United States agencies as justifying its inordinate delay. *See Kuelker*, 20 M.J. at 716-17. Like its first request, the Government's second request boils down to a plea for more time simply because it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request and excluded yet another period of time simply because the Government was still not yet ready to proceed. *See Ramsey*, 28 M.J. at 373.

166. Moreover, the Convening Authority was characteristically short on an explanation of reasons why the period of excludable delay was a reasonable one. If the Convening Authority had not already demonstrated that it was simply a rubber stamp for the Government's many delay requests, it amply demonstrated this fact with its 17 June 2011 excludable delay memorandum. For one thing, the memorandum is quite clearly a cut-and-paste job, identifying the exact same "Basis of Delay" in the exact same order as had been identified in the 12 May 2011 excludable delay memorandum and changing only the date of the Government's request for delay. For another thing, the Convening Authority once again offered no reasons as to why the period of delay was reasonable. The only "Basis of Delay" identified was the OCA classification review process, two Defense requests from 26 August 2010 and 3 September 2010, and the Government request. It offered no explanation of why these items justified the delay as reasonable. The fact that the various requests were made cannot establish that the delay was reasonable. Furthermore, the significance of the Convening Authority's identification of the OCA classification reviews is equally unexplained. Perhaps the Convening Authority meant to suggest that the mere fact that the classification review process was ongoing was proof that any delay until the completion of that process was excludable delay. But this cannot be otherwise this *de facto* determination eliminates the reasonableness determination required under the rule. In order to find that the ongoing nature of the classification review process made any delay reasonable, the Convening Authority would need to know that the classification review process was being conducted in a reasonably diligent manner. The Convening Authority identified no

¹² Unsurprisingly, the Government also offered no explanation for why it was just now, 359 days since PFC Manning was placed into pretrial confinement, learning that some unclassified portions of the CID case file required authorization to be disclosed.

facts indicating that this was the case in its 12 July 2011 memorandum. That's not surprising, either, since the Government had eschewed any effort to provide the Convening Authority with a meaningful description of where the classification review process was, where it had been, and where it was going.

167. Additionally, the Convening Authority once again made no effort to address the concerns and alternatives put forth in the Defense's 26 April 2012 opposition memorandum and reiterated in the Defense email opposing the Government's second request for delay. This refusal to even acknowledge the existence of alternatives to further delay is yet additional evidence that the Convening Authority was simply a rubber stamp to all Government requests for delay. Finally, while the Convening Authority mouthed its familiar refrain that it had "acknowledge[d] and reviewed" the Defense's request for speedy trial, the Convening Authority made no mention of the fact that PFC Manning had spent 385 days in pretrial confinement as of the date of its excludable delay memorandum.

168. In short, the 17 June 2011 excludable delay memorandum is entirely devoid of an articulation of the *reasons* why the exclusion of the delay was reasonable. Even if excluding the prior period of delay was not an abuse of discretion (which the Defense does not in any way concede), the decision to exclude an additional 37 days on the same factual predicate as the prior period with no new reasons to suggest that the delay was reasonable constitutes an abuse of discretion. *See Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same).

169. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 12 May 2011 and 17 June 2011. When these 37 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

g. 17 June 2011 to 5 July 2011

170. The Convening Authority also abused his discretion in approving the Government's third request for delay and excluding the period from 17 June 2011 to 5 July 2011.¹³ The Government once again failed to adequately explain why the delay sought was reasonable, and the Convening Authority once again declined to state its reasons why it found that the period of delay excluded was reasonable.

¹³ The Convening Authority's 5 July 2011 memorandum approving the Government's third request for delay actually purported to exclude from 22 April 2011 to the restart of the Article 32 investigation under R.C.M. 707(c). Because the time period from 22 April 2011 to 17 June 2011 is challenged above, *see* Argument, Part A.4e-f, *supra*, and the time period from 5 July 2011 to the restart of the Article 32 investigation is challenged below, *see* Argument, Part A.4-h-l, *infra*, this subsection deals only with the 5 July 2011 approval memorandum to the extent that it excludes the period from 17 June 2011 to 5 July 2011.

171. The Government made its third request for delay of the Article 32 hearing on 27 June 2011. *See* 27 June 2011 Government Request for Delay, Attachment 36. This request was made two days after the date the Government promised to provide the Convening Authority with an update of the proceedings. *See* 22 May 2011 Government Request for Delay, Attachment 33 (explaining that “[t]he prosecution will provide [the Convening Authority] an update no later than 25 June 2011.”). The Government did not explain its tardiness in its third request for delay. This request once again requested delay “until the United States receives the proper authority to release discoverable unclassified and classified evidence and information to the defense.” 27 June 2011 Government Request for Delay, Attachment 36, at 1. In the “Update” section of its delay request, the Government explained that it was still “continuing” to work with the OCAs. *Id.* The Government also explained that forensic examiners had just discovered another document requiring OCA consent to disclose to the defense. *Id.* The Government related that the National Security Agency (NSA) was still reviewing the unclassified CID case file. *Id.* Finally, the Government explained that the United States Attorney’s Office for the Eastern District of Virginia was “continuing” to work on obtaining the necessary authorizations. *Id.*

172. The Defense opposed the Government’s request for delay via email, maintaining the position articulated in its 26 April 2011 memorandum opposing the Government’s first request for delay. *See* 29 June 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 37. The Defense again requested that any additional delay be credited to the Government. *Id.*

173. On 5 July 2011, the Convening Authority approved the Government’s third request for delay. *See* 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. The only portion of the Convening Authority’s memorandum that can arguably contain any reasons for the delay states in full as follows:

After reviewing pertinent portions of the case file, it is my understanding that ongoing national security concerns exist in this case, as well as an ongoing law enforcement investigation(s) into PFC Manning and others. In light of the national security concerns and ongoing investigation(s), the prosecution will cautiously proceed with the disclosure of information, but will comply with its obligations under Article 46, UCMJ, RCM 405, RCM 701, RCM 703, and applicable case law. In addition, once the prosecution receives the authority to disclose previously undisclosed information to the defense, it will do so expeditiously to minimize any unnecessary delay.

Id.

For reasons similar to those identified above, *see* Argument, Part A.4.e-f, *supra*, the Convening Authority abused its discretion when it excluded the time period from 17 June 2011 to 5 July 2011.

174. As usual, the Government failed to answer the question on the Defense’s mind (and the one that should have been, but evidently was not, on the Convening Authority’s mind): why was the

classification review process *still* ongoing on the date of the Government's third request for delay, 376 days after it had been started on 17 June 2010 and 395 days after PFC Manning was placed into pretrial confinement? The Government only explained that the process was "continuing" in multiple respects. 27 June 2011 Government Request for Delay, Attachment 36.

175. Additionally, the Government's explanation for the delay was as vague as ever. It stated that it was "continuing" to work with the OCAs and that the U.S. Attorney's Office was "continuing" to work on getting the necessary authorizations. *Id.* But saying that a process is "continuing" says nothing about what exactly has already been done and what exactly remains to be done. Without that information, how could the Convening Authority determine that the classification review process was "continuing" at a reasonably diligent pace? The Convening Authority could not and did not come to such a determination. *See Facey*, 26 M.J. at 425. Likewise, the Government explained that the NSA was reviewing the unclassified portion of the CID case file, but it neglected to explain what that review process entailed, how far along the NSA was in that process, and when the NSA was expected to complete this review. Finally, the Government offered no explanation for why its forensic examiners had just now, 395 days after PFC Manning was placed into pretrial confinement, "discovered" a new classified document. Consistent with its prior requests for delay, the Government's third request for delay gave just enough new facts about the processing of the case to create the illusion that many things were happening while not giving away too many facts to reveal the Government's overall lack of reasonable diligence in the classification review process.

176. The conclusion that the Government failed to use reasonable diligence in processing this case towards the Article 32 hearing becomes unmistakable when the length of the completed OCA classification reviews is thrown in the mix. *See* Argument, Part A.4.e, *supra*. Furthermore, the mere fact that the Government needed to coordinate with other United States agencies is no justification for the Government's substantial delay. *See Kuelker*, 20 M.J. at 716-17. Like its first two requests, the Government's third request for delay was simply a plea for more time because the Government was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

177. For its part, the Convening Authority bought the Government's explanation of the necessity for the delay hook, line, and sinker. The Convening Authority, like the Government in its request, offered no reasons why the Government's processing of the case had been diligent enough that the requested delay was reasonable. In fact, the only justification the Convening Authority offered was the ongoing national security concerns and law enforcement investigation(s). *See* 5 July 2011 Memorandum Approving Government Request for Delay, Attachment 38. How did those ongoing national security concerns and law enforcement investigation(s) contribute to the delay in the classification review process? What about the ongoing national security concerns and law enforcement investigation(s) made the delay requested by the Government and eventually excluded by the Convening Authority reasonable? The Convening Authority did not provide an answer to either question. Evidently, the Convening Authority believed that he could invoke important, busy sounding words like "ongoing," "national security concerns," and "law enforcement investigation(s)," without any elaboration whatsoever, just as the Government had repeatedly invoked the phrase that it was "continuing" to work with the OCAs, in order to manufacture the reasonableness of the delay.

However, R.C.M. 707(c) provides for no magic words or incantations that show the reasonableness of the delay; rather, that reasonableness must be shown by stating the reasons for that conclusion. See R.C.M. 707(c) discussion (“[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing.” (emphasis supplied)).

178. Additionally, the Convening Authority once again eschewed any explicit consideration of the alternatives proposed and the concerns voiced by the Defense in its 26 April 2011 memorandum opposing the requested Government’s first requested delay and reiterated in the Defense’s email opposing the Government’s third request for delay. To be sure, the Convening Authority at least acknowledged the fact that the Defense opposed the request for delay, a fact noticeably absent from the Convening Authority’s 12 May 2011 and 17 June 2011 memoranda. But acknowledging the fact that an opposition position was stated is a far cry from considering the substance of that opposition position, and there is nothing to indicate that the Convening Authority gave any consideration to the substance of the Defense’s speedy trial concerns or the suggestions for alternatives to any further periods of delay. The Convening Authority’s failure to give the Defense’s position any meaningful consideration is consistent with what was by 5 July 2011 perfectly clear to all involved: the Convening Authority would not undertake any sort of independent determination of the good cause for the requested delay, but would instead, similar to a grand jury indicting the proverbial ham sandwich, exclude any period of delay that the Government put in front of it.

179. Finally, the Convening Authority failed to mention that the Government did not provide the Convening Authority with an update within the time period the Government had promised. On a matter where the Government’s reasonable diligence (or lack thereof) is front-and-center, it is surprising that the Convening Authority did not even bother to mention that the Government had proved unable to live up to its own deadlines. The Convening Authority’s silence on this point, whether deliberate or inadvertent, is further indication that the Convening Authority was a mere rubber stamp for the Government’s many delay requests.

180. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 17 June 2011 and 5 July 2011. When these 19 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning’s R.C.M. 707 speedy trial rights.

h. 5 July 2011 to 10 August 2011

181. The Convening Authority similarly abused his discretion in excluding the period of 5 July 2011 to 10 August 2011 under R.C.M. 707(c).¹⁴ The troubling pattern of vague status updates by

¹⁴ This subsection challenges two decisions of the Convening Authority: the 26 July 2011 approval of the Government’s fourth request for delay and the 10 August 2011 excludable delay memorandum. The 26 July 2011 approval purports to exclude the time period from 22 April 2011 to the restart of the Article 32 investigation. However, because the period from 22 April 2011 to 5 July 2011 is challenged elsewhere, see Argument, Part A.4.e-g, *supra*, and the period from 10 August 2011 to the restart of the Article 32 investigation is also challenged

the Government that did not explain why further delay was reasonable followed by immediate exclusion of the time period by the Convening Authority with no articulation of the reasons that the exclusion was reasonable also marred the Convening Authority's exclusion of this time period.

182. The Government requested delay of the Article 32 hearing for the fourth time on 25 July 2011. *See* 25 July 2011 Government Request for Delay, Attachment 39. The basis of this request was exactly the same as all of the previous requests: the Government still needed time to get the approvals of the various OCAs to release information to the defense. *See id.* at 1. The Government identified what could arguably be three reasons for the necessity of yet another period of delay: (1) the Government was still "continuing" to work with the OCAs to obtain consent to disclose the relevant information; (2) the NSA review of the unclassified CID case file, along with a similar review of that case file being conducted by another government intelligence organization (OGA), was "ongoing;" and (3) the United States Attorney's Office was still "continuing" to work on obtaining the necessary authorizations. *See id.* The Government also identified the discovery that it had produced to the Defense so far. *See id.*

183. The Defense opposed the Government's request for delay on 25 July 2011. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. The Defense pointed out that "the Government has now had over a year" to complete the classification review process. *Id.* The opposition memorandum also attacked the adequacy of the Government's explanation of why such protracted delay was necessary: "The latest request by the trial counsel for excludable delay does not adequately explain what has been done to require timely response and reviews by the relevant OCAs." *Id.* The Defense also renewed its requests for speedy trial and for the Government to provide a substitute for a summary of the relevant classified documents in order to minimize any further unnecessary delay. *Id.* Finally, the Defense once again requested that any additional delay be credited to the Government instead of being excluded under R.C.M. 707(c). *Id.*

184. The Convening Authority approved the Government's fourth request for delay on 26 July 2011. *See* 26 July 2011 Memorandum Approving Government Request for Delay, Attachment 41. The memorandum merely changed the dates listed in the 5 July 2011 memorandum approving the Government's third request for delay; otherwise, the two memoranda approving the Government's requests for delay were virtually identical.

185. On 10 August 2011, the Convening Authority issued another excludable delay memorandum. *See* 10 August 2011 Excludable Delay Memorandum, Attachment 42. This memorandum stated that "[t]he period from 13 July 2011 until [10 August 2011] is excludable delay under RCM 707(c)." *Id.* The Convening Authority relied on the exact same bases for

elsewhere, *see* Argument, Part A.4.i-1, *infra*, this subsection only challenges the 26 July 2011 approval to the extent that it excludes the time period from 5 July 2011 to 10 August 2011.

Additionally, as explained *infra* in the text of this subsection, there are no additional facts in the record from the 26 July 2011 approval of the Government's fourth request for delay and the Convening Authority's 10 August 2011 excludable delay memorandum. Therefore, because the factual basis underlying the 26 July 2011 approval and the 10 August 2011 excludable delay memorandum is identical, this subsection also challenges the propriety of this memorandum.

delay as it had relied on in the excludable delay memoranda of 12 May 2011 and 17 June 2011 and simply added the latest Government request for delay as an additional basis. *See id.* The 10 August 2011 excludable delay memorandum provided the following in the “Basis of Delay” section:

The above delay is based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities’ (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government’s Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- e. Government Request for Delay of Article 32 Investigation, dated 25 July 2011 (enclosed).

Id.

186. For many of the same reasons articulated above, *see* Argument Part A.4.e-g, the Convening Authority once again abused its discretion in excluding, via the 26 July 2011 memorandum approving the Government’s fourth request for delay and the 10 August 2011 excludable delay memorandum, the period from 5 July 2011 to 10 August 2011 from the R.C.M. 707 speedy trial clock.

187. First of all, nowhere in the “Update” section of its request for delay did the Government provide any explanation whatsoever for why the classification review process had still not been completed 404 days after the process began on 17 June 2010 and 423 days after PFC Manning was placed into pretrial confinement. The only three points that could conceivably be characterized as “reasons” for the requested delay were that the Government was “continuing” to work with the OCAs, the review of the unclassified CID case file was “ongoing,” and that the United States Attorney’s Office for the Eastern District of Virginia was “continuing” its work. 25 July 2011 Government Request for Delay, Attachment 39. These points tell us nothing about the progress had been made in the past 404 days, what remained to be done, and approximately when the “ongoing” tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government’s request for delay was reasonable because he had no sufficient basis to assess whether the Government was performing these “ongoing” tasks in a reasonably diligent manner. *See Facey*, 26 M.J. at 425. In this respect, the Government’s proffered “reasons” were as flawed as always. *See* Argument, Part A.4.e-g, *supra*. Moreover, the fact that the Government finally provided the Defense with discovery similarly gives no indication of the diligence (or lack thereof) with which the Government was handling the classification review process.

188. Additionally, the length of the completed OCA classification reviews casts further doubt on the Government's contention that it was working diligently in obtaining consent from the OCAs. See Argument, Part A.4.e, *supra*. Finally, the Government's need to coordinate with other United States agencies to obtain information cannot excuse its inordinate delay in the processing of this case. See *Kuelker*, 20 M.J. at 716-17. Like its first three requests, the Government's fourth request for delay was simply a plea for more time because the Government was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. See *Ramsey*, 28 M.J. at 373.

189. With this meager explanation of the necessity of yet another period of delay in the Article 32 hearing, one might expect the Convening Authority to make a slightly more searching inquiry before concluding that the fourth requested period of delay was a reasonable one. One would be mistaken, however, as the Convening Authority approved the Government's request the very next day after the request was made. The Convening Authority's cut-and-paste approval of the Government's fourth request for delay, offering as it does the exact same "reasons" that were put forth in the Convening Authority's 5 July 2011 approval of the Government's third request for delay, requires little comment in addition to what has already been provided above. See Argument, Part A.4.g, *supra*. It suffices to say that the Convening Authority yet again failed to articulate specifically what about the ongoing national security concerns and law enforcement investigation(s) made the delay requested by the Government and eventually excluded by the Convening Authority as reasonable excludable delay. Even if clinging to the phrase "ongoing national security concerns and law enforcement investigation(s)" as if it were a magic phrase was not an abuse of discretion on 5 July 2011, which the Defense submits it was, surely clinging to the same phrase nearly a month later with no elaboration whatsoever of any new developments justifying the further period of delay does constitute an abuse of discretion.

190. Similarly, the Convening Authority's 10 August 2011 excludable delay memorandum suffers from the same incurable flaws that plagued all of the Convening Authority's excludable delay memoranda from 22 April 2011 onward. See Argument, Part A.4.e-f, *supra*. As always, the Convening Authority appears to have done nothing on his own to fulfill his responsibility to conduct an independent determination as to the good cause for or reasonableness of the delay. See *Lazauskas*, 62 M.J. at 45 (Baker, J., concurring); *Thompson*, 46 M.J. at 474-75. Moreover, the Convening Authority once again failed to articulate the *reasons* why the various items listed in the "Basis of Delay" section made the excluded period of delay reasonable. See *Savard*, 2010 WL 4068964, at *3 (explaining that excluded delays under R.C.M. 707(c) must be reasonable); *Melvin*, 2009 WL 613883, at *7 (same); *Billquist*, 2008 WL 2259774, at *2 (same); *Brown*, 2008 WL 1956589, at *9 (same); *McDuffie*, 65 M.J. at 634 (same); *Fujiwara*, 64 M.J. at 699 (same); *Rowe*, 2003 WL 828986, at *1 (same); *Proctor*, 58 M.J. at 795 (same); *Weatherspoon*, 39 M.J. at 766 (same); *Hayes*, 37 M.J. at 772 (same). The fact that the classification review process was still "ongoing," or that the various cited requests were made, tells us nothing about why the excluded time period is a period of reasonable delay under R.C.M. 707(c). Without an articulation of the reasons supporting the Convening Authority's conclusion that the delay was reasonable, this Court is left with no other choice but to find that the Convening Authority abused its discretion in so thoroughly abdicating its responsibilities to consider the reasonableness of the requested delay.

191. Most troubling about the 26 July 2011 memorandum approving the Government's fourth request for delay and the 10 August 2011 excludable delay memorandum is that neither document addresses the main concern of the Defense opposition memorandum, a concern which strikes at the heart of the exclusion of this time period and indeed every other time period challenged in this Motion: the Government had provided the Convening Authority with absolutely no explanation for why the classification review process had not been completed over a year after PFC Manning was placed into pretrial confinement. *See* 25 July 2011 Defense Opposition to Government Request for Delay, Attachment 40. Neither of the Convening Authority's memoranda excluding the time period from 5 July 2011 to 10 August 2011 addressed the alternatives to further delay suggested by the Defense on numerous occasions. And neither memorandum appeared to give any consideration to the fact that PFC Manning had been in pretrial confinement for 424 days as of the date of the 26 July 2011 memorandum and 439 days as of the date of the 10 August 2011 memorandum. Because the Convening Authority gave no apparent consideration to any of the Defense's arguments against delay, the Convening Authority yet again revealed that he was simply a rubber stamp for approving Government delay requests.

192. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 5 July 2011 and 10 August 2011. When these 37 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

i. 10 August 2011 to 29 August 2011

193. The Convening Authority also abused his discretion in approving the Government's fifth request for delay and excluding the period from 10 August 2011 to 29 August 2011.¹⁵ As always, the Government failed to provide a sufficient explanation for why the classification review process was still ongoing, well over a year after the process ostensibly began. Not to be outdone, the Convening Authority took his usual route: exclusion of the requested time period with absolutely no articulation of the reasons that justified that exclusion as reasonable.

194. The Government made its fifth request for delay of the Article 32 hearing on 25 August 2011. *See* 25 August 2011 Government Request for Delay, Attachment 43. The basis for the requested delay was the same as before: the Government still, over a year and two months after PFC Manning was placed into pretrial confinement, needed time to obtain the authority from the OCAs to disclose evidence and information to the Defense. *See id.* at 1. The Government once

¹⁵ In its 29 August 2011 memorandum approving the Government's fifth request for delay, the Convening Authority purported to exclude the period from 22 April 2011 to the date of the restart of the Article 32 investigation. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. However, because the exclusion of the time period from 22 April 2011 to 10 August 2011 is challenged above, *see* Argument, Part A.4.e-h, *supra*, and the exclusion of the time period from 29 August 2011 to the restart of the Article 32 hearing is challenged below, *see* Argument, Part A.4.j-l, *infra*, this subsection only challenges that portion of the Convening Authority's 29 August 2011 memorandum that excludes the time period from 10 August 2011 to the date of the memorandum.

again related, without elaboration, that it was still “continuing” to work with the OCAs and that the NSA review of the unclassified CID case file was still “ongoing.” *Id.* The Government added now in its fifth request that the CID was conducting a secondary review of the derivative classification of the forensic reports and that it was “continuing” to work with the FBI and DSS to receive authorization to disclose the relevant portions of any case files. *Id.* at 1-2. Finally, the Government stated the following in its “Request” section of its fifth request for delay:

Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation The prosecution has actively and diligently worked to resolve all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

Id. at 2.

195. The Defense once again opposed the Government’s request for delay, reiterating its position that any additional delay should not be excluded under R.C.M. 707(c) but should rather be credited to the Government for speedy trial purposes. *See* 27 August 2011 Email from Mr. Coombs to COL Coffman Opposing the Government’s Request for Delay, Attachment 44.

196. The Convening Authority yet again approved the Government’s request for delay on 29 August 2011. *See* 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. This memorandum was quite plainly another cut-and-paste job, identical to the 5 July 2011 and 26 July 2011 approval memoranda in all respects save the updated dates.

197. For many of the same reasons articulated above, *see* Argument Part A.4.e-h, the Convening Authority once again abused his discretion in excluding the period from 10 August 2011 to 29 August 2011 from the R.C.M. 707 speedy trial clock.

198. Yet again, the Government provided no explanation whatsoever for why the classification review process had still not been completed 435 days after the process began on 17 June 2010 and 454 days after PFC Manning was placed into pretrial confinement. The Government merely repeated that it was “continuing” to work with the OCAs and that the review of the unclassified CID case file was “ongoing.” 25 August 2011 Government Request for Delay, Attachment 43. In other words, as explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about the progress had been made in the past 435 days, what remained to be done, and approximately when the “ongoing” tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government was performing these “ongoing” tasks in a reasonably diligent manner and thus had no sufficient basis to assess whether the Government’s request for delay was reasonable. *See Facey*, 26 M.J. at 425.

199. The new “reasons” offered by the Government were equally unhelpful. While the Government stated that it was “continuing” to work with the FBI and DSS, for example, it failed to specify why the work with the FBI and DSS was not already completed after 454 days of

pretrial confinement for PFC Manning, when the Government began to work with the FBI and DSS, and how much more work needed to be done. Accordingly, the Government provided the Convening Authority with no information to assess whether the Government had been reasonably diligent in working with the FBI and DSS. Similarly, the Government's lack of explanation with respect to the CID secondary review process left the same questions lingering.

200. Additionally, the Government's statement towards the end of the memorandum that yet further delay was necessary "[g]iven the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews" provides no support for the Convening Authority's exclusion decision. 25 August 2011 Government Request for Delay, Attachment 43. It is important to note that the Government offered no elaboration of what it meant by "complexity," "the number of classification authorities involved" and "the volume of information requiring classification reviews." *Id.* The statement has two potential implications: (i) coordination with the number of classification authorities involved made this case complex; and (ii) the volume of information requiring classification reviews made this case complex. Without any elaboration, neither potential implication is a valid reason for further delay.

201. In regards to the coordination with the number of classification authorities, the Government did not specify how many classification authorities were involved and what the coordination with those classification authorities entailed. Without elaboration, therefore, it amounts to a contention that the mere fact that the Government has to coordinate with several different OCAs makes the requested delay reasonable. But such a contention is meritless, however, since "the need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'" *Kuelker*, 20 M.J. at 716.

202. With respect to the volume of information requiring classification reviews, it bears repeating that the length of the completed OCA classification reviews belies the contention that this process was as onerous as the Government represents. As mentioned above, *see* Argument, Part A.4.e, *supra*, of the ten OCA classification reviews provided to the Defense by the Government, only three were over twelve pages in length. Six of the classification reviews were four pages or less in length. The Government's explanation does not address why the classification reviews of "the volume of information requiring classification reviews," if as substantial as the Government asserts, yield as little as a few pages in results. Perhaps the Government could have explained why a classification review of a large volume of information might yield only a few pages of results. But that is entirely beside the point. The important and undeniable fact is the Government failed to provide any such explanation, and that the Convening Authority was therefore without such an explanation when he approved the Government's fifth request for delay.

203. Finally, the Government's assertion that it has been "actively and diligently" been working, 25 August 2011 Government Request for Delay, Attachment 43, is utterly meaningless. In effect, it amounts to a plea along the following lines: "Trust us. We've been working really hard. Diligently too. Don't worry about a thing because we've definitely been reasonably diligent." For one thing, nothing in R.C.M. 707 or within the realm of common sense would suggest that

the Government can show that it has been reasonably diligent simply by saying that it has been reasonably diligent. Since the Government has the burden of proof on a speedy trial motion, *see* Burden of Persuasion and Burden of Proof, *supra*, it cannot be that the Government can simply assert “we’ve been diligently working” and that is the end of the matter.

204. For another thing, the fact that the Government resorted to making such a meaningless, self-serving statement is yet further evidence that the Government has not been reasonably diligent. If the Government had really been actively and diligently processing this case, it wouldn’t need to say so; it could just impress the Convening Authority by stating in detail all of the tasks necessary to complete the classification review process, all the tasks that had already been done, and all of the tasks that still needed to be completed. Of course, the Government’s requests for delay are worlds apart from requests containing such impressive detail. Indeed, if the Government had really been actively and diligently processing this case, it wouldn’t need to make a fifth request for delay 454 days after PFC Manning was placed in pretrial confinement. Once again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority abused his discretion in approving the request. *See Ramsey*, 28 M.J. at 373.

205. Moving to the Convening Authority’s approval memorandum, the Convening Authority offered no new reasons for delay. Rather, it simply regurgitated the same nonsense about “ongoing national security concerns and law enforcement investigation(s),” without any elaboration whatsoever about what that phrase meant and how it made the requested delay reasonable. Since no new reasons were articulated to justify the period of delay from 10 August 2011 to 29 August 2011, no new reasons need be articulated here to show why the Convening Authority’s approval of the Government’s fifth request for delay was a mere rubber stamp and, therefore, a patent abuse of discretion. Accordingly, the Defense simply relies on the arguments against the 5 July 2011 and 27 July 2011 approval memoranda stated above. *See* Argument, Part A.4.g-h, *supra*. It suffices to say that the rehashing of an obviously insufficient explanation of the reasons why the Convening Authority determined the period of delay to be reasonable is an even stronger case of an abuse of discretion than it was to provide that insufficient explanation the first time.

206. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 10 August 2011 and 29 August 2011. When these 20 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning’s R.C.M. 707 speedy trial rights.

j. 29 August 2011 to 14 October 2011

207. The Convening Authority similarly abused his discretion in approving the Government’s sixth request for delay and excluding the period from 29 August 2011 to 14 October 2011.¹⁶ The

¹⁶ This subsection actually challenges two exclusion decisions of the Convening Authority: the 28 September 2011 approval of the Government’s sixth request for delay and the 14 October 2011 excludable delay memorandum. The 14 October 2011 excludable delay memorandum excluded the period from 15 September 2011 to 14 October 2011.

Government yet again failed to provide a sufficient explanation of why it was reasonable to grant further delay in the commencement of the Article 32 hearing, and the Convening Authority once again failed to articulate the reasons why the excluded delay was reasonable.

208. The Government's sixth request for delay, filed on 26 September 2011, was a virtual carbon copy of its fifth request for delay. *See* 26 September 2011 Government Request for Delay, Attachment 46. Like its prior requests, the sixth request represented that further delay was necessary because the Government had still not received the authority necessary to disclose classified and unclassified evidence to the Defense. *See id.* at 1. The Government was still "continuing" to work with the OCAs regarding the classification reviews and with the NSA regarding the unclassified CID case file. *Id.* The Government was also still working with the FBI and DSS, and it represented that it had just now started to review the FBI and DSS files for discoverable information. *See id.* Finally, the Government repeated verbatim the two line phrase that was contained in its fifth request for delay:

Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation The prosecution has actively and diligently worked to resolve all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

Id. at 2.

209. The Defense opposed the Government's sixth request for delay on 27 September 2011. *See* 27 August 2011 Email from Mr. Coombs to COL Coffman Opposing the Government's Request for Delay, Attachment 47. The Defense reiterated its position that any delay should not be excluded under R.C.M. 707(c), but rather should be credited to the Government for speedy trial purposes. *Id.*

210. The next day, the Convening Authority approved the Government's sixth request for delay. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. With the exception of changed dates, this approval memorandum was identical to the Convening Authority's approval of the Government's fifth request for delay.

See 14 October 2011 Excludable Delay Memorandum, Attachment 49. However, the only thing identified in the 14 October 2011 excludable memorandum that was not identified in the 10 August 2011 excludable delay memorandum is the Government's sixth request for delay. Therefore, it makes sense to consider the approval of the Government's sixth request for delay and the propriety of the 14 October 2011 excludable delay memorandum in the same subsection.

Additionally, the 28 September 2011 approval of the Government's sixth request for delay purports to exclude the period from 22 April 2011 to the restart of the Article 32 investigation. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 48. However, since the exclusion of the period from 22 April 2011 to 29 August 2011 is challenged above, *see* Argument, Part A.4.e-i, *supra*, and the exclusion of the period from 14 October 2011 to the restart of the Article 32 investigation is discussed elsewhere, *see* Argument, Part A.4.k-l, *infra*, this subsection only challenges the portion of the 28 September 2011 approval memorandum that excludes the period from 29 August 2011 to 14 October 2011.

211. The Convening Authority issued another excludable delay memorandum on 14 October 2011, in which the period from 15 September 2011 to 14 October 2011 was found to be excludable delay under R.C.M. 707(c). *See* 14 October 2011 Excludable Delay Memorandum, Attachment 49. The basis for the excludable delay identified in the 14 October 2011 memorandum was virtually identical to the 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. In full, the “Basis of Delay” section read as follows:

The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities’ (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government’s Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010 (enclosed).
- e. Government Request for Delay of Article 32 Investigation, dated 26 September 2011 (enclosed).

Id.

212. For many of the same reasons articulated above, *see* Argument, Part A.4.e-i, *supra*, the Convening Authority once again abused his discretion in approving the Government’s sixth request for delay and excluding the time period from 29 August 2011 to 14 October 2011.

213. Since the Government’s sixth request for delay was nearly indistinguishable from its fifth request for delay, the attacks levied above at the fifth request, *see* Argument, Part A.4.i, *supra*, are equally applicable here and need not be regurgitated. As always, the Government provided no explanation whatsoever for why the classification review process had still not been completed 467 days after the process began on 17 June 2010 and 486 days after PFC Manning was placed into pretrial confinement. As explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about the progress made in the past 467 days, what remained to be done, and approximately when the “ongoing” tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government was performing these “ongoing” tasks in a reasonably diligent manner and thus had no sufficient basis to assess whether the Government’s request for delay was reasonable. *See Facey*, 26 M.J. at 425. The Government also provided no explanation of why it was just now, 486 days after PFC Manning had been placed into pretrial confinement, starting to review the FBI and DSS case files.

214. The Government’s repetition of its statements towards the end of the memorandum that yet further delay was necessary “[g]iven the complexity of this case, stemming from the number of

classification authorities involved and the volume of information requiring classification reviews” and that the Government was “actively and diligently” working as as pointless in its 26 September 2011 request as it was in its 25 August 2011 request. Once again, the Government offered no elaboration of what it meant by “complexity,” “the number of classification authorities involved,” “the volume of information requiring classification reviews” or of how it was working “actively and diligently.” *Id.* As nothing changed in the Government’s use of these phrases, the arguments against these phrases in the Government’s fifth request for delay are fully applicable here. *See* Argument, Part A.4.i, *supra*. Yet again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

215. Not to be outdone, the Convening Authority’s approval memorandum and excludable delay memorandum were as flawed as ever. As the Convening Authority’s 28 September 2011 approval memorandum was identical (save for the updated dates) to its 5 July 2011, 26 July 2011, and 29 August 2011 approval memoranda, the various arguments against the Convening Authority’s decision to approve yet another Government delay request need not be repeated. *See* Argument, Part A.4.g-i, *supra*. If merely reciting, without any elaboration whatsoever, the phrase “ongoing national security concerns and law enforcement investigation(s)” wasn’t an abuse of discretion the first three times (which the Defense does not in any way concede), surely doing it a fourth time in three months did constitute an abuse of discretion.

216. Likewise, as the Convening Authority’s excludable delay memorandum was identical in all respects, except for the date of the Government request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-i, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the “Basis of Delay” section justified yet another period of delay when PFC Manning had remained in pretrial confinement for 504 days as of 14 October 2011.

217. Finally, neither the 28 September 2011 approval memorandum nor the 14 October 2011 excludable delay memorandum made any mention that the Government was tardy in providing its update in its sixth request for delay. In the Convening Authority’s 29 August 2011 memorandum approving the Government’s fifth request for delay, the Convening Authority stated: “The prosecution is required to provide me an update no later than 23 September 2011.” 29 August 2011 Memorandum Approving Government Request for Delay, Attachment 45. The Government’s update was contained in its sixth request for delay, which was filed three days after the Convening Authority’s deadline. 26 September 2011 Government Request for Delay, Attachment 46. As the Government’s diligence (or lack thereof) is an issue of paramount importance in determining whether a particular period of delay is reasonable excludable delay, it is hard to fathom how the Convening Authority neglected to even mention the Government’s untimeliness in complying with the update deadline. This serves as yet additional evidence that the Convening Authority had long ago given up on any pretense of being an independent arbiter of the necessity and reasonableness of the requested delays, and had morphed into a mere rubber stamp for all of the Government’s many delay requests.

218. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 29 August 2011 to 14 October 2011. When these 47 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

k. 14 October 2011 to 16 November 2011

219. The Convening Authority also abused his discretion in approving the Government's seventh request for delay and excluding the period between 14 October 2011 and 16 November 2011.¹⁷ Not changing a thing about the lack of detail provided in the past, the Government provided no explanation of why it still was not ready for the Article 32 investigation, 517 days after PFC Manning was placed into pretrial confinement. Moreover, the Convening Authority once again punted its responsibility to articulate the reasons why the excluded delay was reasonable.

220. The Government made its seventh request to delay the Article 32 hearing on 25 October 2011. *See* 25 October 2011 Government Request for Delay, Attachment 50. The reasons for the requested delay were the same as ever: the Government still needed more time to obtain authority to release evidence and information to the defense. *See id.* at 1. The Government once again explained that it was still just "continuing" to work with the OCAs. Likewise, the Government again repeated verbatim the two line phrase that was contained in its fifth request for delay:

Given the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews, the prosecution requests a reasonable delay of restarting the Article 32 investigation The prosecution has actively and diligently worked to resolve all outstanding issues to ensure timely release of all possible information to the defense so their ability to represent and potentially defend their client will be in no way impaired.

Id. at 2-3.

¹⁷ This subsection actually challenges two exclusion decisions of the Convening Authority: the 27 October 2011 approval of the Government's seventh request for delay and the 16 November 2011 excludable delay memorandum. The 16 November 2011 excludable delay memorandum excluded the period from 14 October 2011 to 16 November 2011. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. Additionally, the 27 October 2011 approval of the Government's seventh request for delay purports to exclude the period from 22 April 2011 to the restart of the Article 32 investigation. *See* 28 September 2011 Memorandum Approving Government Request for Delay, Attachment 52. However, since the exclusion of the period from 22 April 2011 to 14 October 2011 is challenged above, *see* Argument, Part A.4.e-j, *supra*, and the exclusion of the period from 16 November 2011 to the restart of the Article 32 investigation is discussed below, *see* Argument, Part A.4.i, *infra*, this subsection only challenges the portion of the 27 October 2011 approval memorandum that excludes the period from 14 October 2011 to 16 November 2011.

221. The Defense opposed this request for delay on the same day. *See* 25 October 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 51. In this email, the Defense repeated its previous position that any additional delay should not be excluded under R.C.M. 707(c) but should be credited to the Government for speedy trial purposes. *Id.*

222. The Convening Authority approved the Government's seventh request for delay on 27 October 2011. *See* 27 October 2011 Memorandum Approving Government Request for Delay, Attachment 52. With the exception of changed dates, this approval memorandum was identical to the Convening Authority's approval of the Government's sixth request for delay.

223. On 16 November 2011, the Convening Authority issued yet another excludable delay memorandum. *See* 16 November 2011 Excludable Delay Memorandum, Attachment 53. The basis for the excludable delay identified in the 16 November 2011 memorandum was virtually identical to the 14 October 2011, 10 August 2011, 17 June 2011, and 12 May 2011 excludable delay memoranda. In full, the "Basis of Delay" section read as follows:

The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities' (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Government Request for Delay of Article 32 Investigation, dated 27 October 2011 (enclosed).

Id.

224. For the same reasons articulated above, *see* Argument, Part A.4.e-j, *supra*, the Convening Authority once again abused his discretion in approving the Government's seventh request for delay and excluding the time period from 14 October 2011 to 16 November 2011.

225. Since the Government's seventh request for delay was nearly indistinguishable from its fifth and sixth requests for delay, the attacks levied above at the fifth and sixth requests, *see* Argument, Part A.4.i-j, *supra*, are equally applicable here. The Government yet again failed to provide any explanation whatsoever for why the classification review process had *still* not been completed 498 days after the process began on 17 June 2010 and 517 days after PFC Manning was placed into pretrial confinement. As explained above, *see* Argument Part A.4.h, *supra*, the Government said nothing about what progress had been made in the past 498 days, what specifically remained to be done, and approximately when the "ongoing" tasks would be completed. Without this information, the Convening Authority had no sufficient basis to assess whether the Government was performing these "ongoing" tasks in a reasonably diligent manner

and thus had no sufficient basis to assess whether the Government's request for delay was reasonable. *See Facey*, 26 M.J. at 425.

226. The Government's statements towards the end of the memorandum that yet further delay was necessary "[g]iven the complexity of this case, stemming from the number of classification authorities involved and the volume of information requiring classification reviews" and that the Government was "actively and diligently" working were as meaningless as ever. Once again, the Government offered no elaboration of what it meant by "complexity," "the number of classification authorities involved," "the volume of information requiring classification reviews" or of how it was working "actively and diligently." As nothing changed in the Government's use of these phrases, the arguments against these phrases in the Government's fifth request for delay are fully applicable here. *See* Argument, Part A.4.i, *supra*. Yet again, it seems that the Government requested further delay for the simple reason that it was not yet ready to proceed. Accordingly, the Convening Authority should not have approved the request. *See Ramsey*, 28 M.J. at 373.

227. For its part, the Convening Authority's approval memorandum and excludable delay memorandum were as bare-bones as imaginable. As the Convening Authority's 27 October 2011 approval memorandum was identical (save for the updated dates) to its 5 July 2011, 26 July 2011, 29 August 2011, and 28 September 2011 approval memoranda, the various arguments against the Convening Authority's decision to approve yet another Government delay request need not be repeated. *See* Argument, Part A.4.g-j, *supra*. If merely reciting, without any elaboration whatsoever, the phrase "ongoing national security concerns and law enforcement investigation(s)" wasn't an abuse of discretion the first four times (which the Defense does not in any way concede), surely doing it a fifth time in four months did constitute an abuse of discretion.

228. Likewise, as the Convening Authority's 16 November 2011 excludable delay memorandum was identical in all respects, except for the date of the Government request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-i, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the "Basis of Delay" section justified yet another period of delay when PFC Manning had remained in pretrial confinement for 537 days as of 16 November 2011.

229. For these reasons, the Convening Authority abused its discretion in excluding the period of time between 14 October 2011 to 16 November 2011. When these 34 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

I. 16 November 2011 to 15 December 2011

230. Finally, the Convening Authority abused his discretion in approving the Government's eighth request for delay and excluding the period between 16 November 2011 and 15 December

2011.¹⁸ The Government once again provided no explanation of why it still was not ready for the Article 32 investigation, 537 days after PFC Manning was placed into pretrial confinement. Moreover, the Convening Authority again abdicated its responsibility to articulate the reasons why the excluded delay was reasonable.

231. The Government made its eighth and final request for delay on 16 November 2011. *See* 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54. The Government explained that it “has continued to work diligently to resolve the . . . issues that served as the basis for the delay of the Article 32 investigation” but nonetheless related that it was still not ready to proceed with the Article 32 investigation. *Id.* at 1. The Government related that yet further delay was necessary for two reasons. *See id.* at 2. First, the Government was *still* working with an OCA to obtain one final classification review. *Id.* Second, the Government explained that the command required 30 days to execute OPLAN BRAVO, a prerequisite to the Article 32 hearing. *Id.*

232. The Defense opposed the Government’s eighth request for delay the same day it was made. *See* 16 November 2011 Email from Mr. Coombs to COL Coffman Opposing Government Request for Delay, Attachment 55. The Defense email explained that Mr. Coombs had sent an email to then-CPT Fein on Monday, 14 November 2011, in which Mr. Coombs requested that the Government begin its OPLAN BRAVO preparations so that the Article 32 hearing could commence on 12 December 2011. *Id.* The email went on to explain that based on the Government’s most recent request for delay, it appeared that the Government had done nothing from 14 November 2011 to 16 November 2011. *Id.* The Defense pointed out that the Government failed to provide the Convening Authority “with any justification for the arbitrary 30-day-requirement in order to complete its OPLAN BRAVO.” *Id.* Finally, the Defense objected to the Government’s request to exclude the time period of 16 November 2011 to 16 December 2011 under R.C.M. 707(c) and requested instead that the delay be credited against the Government for speedy trial purposes. *Id.*

233. Later that same day, the Convening Authority approved the Government’s eighth request for delay, excluding the time period from 22 April 2011 to 16 December 2011 under R.C.M. 707(c). *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. The Convening Authority’s decisional process, to the extent that it can be gleaned from this memorandum, is captured in full in the following two sentences: “I reviewed both the prosecution’s request and its enclosures and the defense’s response. 2. This request is: (signature) approved.” *Id.*

¹⁸ This subsection actually challenges two exclusion decisions of the Convening Authority: the 16 November 2011 approval of the Government’s eighth request for delay and the 3 January 2012 excludable delay memorandum. The 3 January 2012 excludable delay memorandum excluded the period from 16 November 2011 to 15 December 2011. *See* 3 January 2012 Excludable Delay Memorandum, Attachment 60. Additionally, the 16 November 2011 approval of the Government’s eighth request for delay purports to exclude the period from 22 April 2011 to 16 December 2011. *See* 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. However, since the exclusion of the period from 22 April 2011 to 16 November 2011 is challenged above, *see* Argument, Part A.4.d-k, *supra*, this subsection only challenges the portion of the 16 November 2011 approval memorandum that excludes the period from 16 November 2011 to 16 December 2011.

234. The Convening Authority issued its last excludable delay memorandum on 3 January 2012. See 3 January 2012 Excludable Delay Memorandum, Attachment 60. The memorandum's "Basis of Delay" section was as familiar as ever:

The period of excludable delay is reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

- a. Original Classification Authorities' (OCA) reviews of classified information.
- b. OCA consent to disclose classified information.
- c. Defense Request for Results of the Government's Classification Reviews by the OCA, dated 26 August 2010 (enclosed).
- d. Government Request for Delay of Article 32 Investigation, dated 10 November 2011 (enclosed).

*Id.*¹⁹

235. For the same reasons articulated above, see Argument, Part A.4.e-k, *supra*, the Convening Authority once again abused his discretion in approving the Government's seventh request for delay and excluding the time period from 16 November 2011 to 15 December 2011.

236. As far as the Government request goes, it once again offers no explanation of the reasons why further delay would be reasonable. With respect to the outstanding OCA classification, the Government just states that it was "continuing" to work with the OCAs and that one classification request was still outstanding. 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54, at 2. Evidently, the Government was operating under the assumption that because it was not yet ready for the Article 32 investigation, the Convening Authority could simply exclude the time period under R.C.M. 707(c). This is a flatly incorrect understanding of how the R.C.M. 707(c) exclusion process operates. See *Ramsey*, 28 M.J. at 373 ("If, however, a recess or continuance is requested solely because the Government is not prepared to go forward with evidence on the merits, such time should not be excluded from its speedy-trial accountability.").

237. The Government's claim that it has been "diligently" working on the processing of this case, 16 November 2011 Government Request to Restart Article 32 Investigation, Attachment 54, at 1, borders on the absurd. At the time of the request, 537 days had passed since PFC Manning was placed into pretrial confinement. 518 days had passed since the Government claims to have begun the classification review process. The completed classification reviews were hardly Tolstoy novels, some spanning only a few pages. And yet the classification review process had *still* not been finished. Something doesn't add up. That "something" is the

¹⁹ The Convening Authority's reference to the 10 November 2011 Government Request for delay is likely an error. The Defense is not aware of any 10 November 2011 Government request for delay. The Government's eighth request for delay was made on 16 November 2011, not 10 November 2011. Therefore, the Convening Authority was likely referring to the Government's 16 November 2011 request for delay.

Government's unsupported and grossly self-serving claims of working "diligently" throughout the process.

238. With respect to the 30 day period necessary to implement OPLAN BRAVO, the Government offered absolutely no support for its claim that 30 days were needed to put the plan into effect. The arbitrariness of the 30 day period was pointed out to the Convening Authority by the Defense, to no avail. The unexplained extra 30 day period is perfectly consistent with the likelihood that the Government was simply not ready for the Article 32 hearing in mid-November but felt like it would be by mid-December. Of course, the mere fact the Government is not ready to proceed cannot itself justify excluding that period of delay. *See Ramsey*, 28 M.J. at 373.

239. The Convening Authority's exclusion decisions were no better. With respect to the approval of the Government's eighth request for delay, the Convening Authority offered even less of an explanation than its usual non-explanation of the reasons for the delay. The Convening Authority commendably scrapped the unelaborated nonsense about the "ongoing national security concerns and law enforcement investigation(s)" that plagued the Convening Authority's 5 July 2011, 26 July 2011, 29 August 2011, 28 September 2011, and 27 October 2011 approval memoranda. In its place, the Convening Authority offered . . . well, nothing. Not one reason that the delay was approved. The Convening Authority's "decision" to approve is contained in the following two sentences: "I reviewed both the prosecution's request and its enclosures and the defense's response. 2. This request is: (signature) approved." 16 November 2011 Memorandum Approving Government Request for Delay, Attachment 56. No explanation of reasons was given. This complete failure to provide any reasons whatsoever (not even bad ones) for approving the Government's eighth request for delay clearly constitutes an abuse of discretion. *See* R.C.M. 707(c) discussion ("[T]he decision granting the delay, together with supporting *reasons* and the dates covering the delay, should be reduced to writing."²⁰ (emphasis supplied)

240. If more were needed to torpedo the Convening Authority's approval of the Government's eighth request for delay, the approval was issued on the same day as the request was made. This incredibly quick turnaround time belies any claim that the Convening Authority gave this request the requisite independent determination of good cause for the delay, *see Lazauskas*, 62 M.J. at 45 (Baker, J., concurring), and confirms the Defense's belief that the Convening Authority had long been a mere rubber stamp for the Government's many delay requests. To truly put the Convening Authority's blazingly fast approval into proper context, consider all that happened on 16 November 2011: the Convening Authority issued an excludable delay memorandum for the period between 14 October 2011 to 16 November 2011; the Government requested that the Article 32 hearing be restarted on 16 December 2011; the Defense countered that the Article 32 hearing should recommence on 12 December 2011; the Convening Authority decided that the Article 32 hearing would commence on 16 December 2011; the Government made its eighth

²⁰ The discussion to R.C.M. 707(c) recognizes that it may not always be practicable to reduce the decision to grant or deny a reasonable delay to writing. Although the discussion section does not provide an example of when it would not be practicable, the Defense could envision times where military exigencies may prevent reducing the decision to writing).

request for delay; the Defense opposed; the Convening Authority granted the delay; and the Convening Authority issued special instructions to the Article 32 IO. This is a lot for any Convening Authority to tackle in one day. When coupled with the several long periods of Government inactivity, *see* Facts, Part A.4, *supra*, and the Government's overall incredibly lethargic processing of this case, this flurry of activity is particularly unmistakable. Given all of the tasks that the Convening Authority accomplished on 16 November 2011, it seems rather dubious that the Convening Authority gave any careful thought to the eighth Government delay request, which arrived the same day it was approved.

241. With respect to the Convening Authority's 3 January 2012 excludable delay memorandum, it was decidedly more of the same. As the 3 January 2012 excludable delay memorandum was identical in all respects, except for the date of the Government's request for delay, to the many excludable delay memoranda that came before, the same arguments against these prior excludable delay memoranda are fully applicable here. *See* Argument, Part A.4.e-k, *supra*. Once again, the Convening Authority offered no reasons why the various items listed in the "Basis of Delay" section justified yet another period of delay when PFC Manning had already languished in pretrial confinement for 585 days as of 3 January 2012.

242. Finally, neither the Convening Authority's approval of the Government's eighth request for delay nor its 3 January 2012 excludable delay memorandum gave any consideration to the Defense's opposition arguments. Particularly troubling, the Convening Authority made no mention whatsoever of the Defense's position that the 30 day request to implement OPLAN BRAVO was wholly arbitrary. The Convening Authority's decision to forgo any express consideration of the Defense's legitimate concerns is yet further evidence that the Convening Authority was a mere rubber stamp of any and all Government delay requests.

243. For these reasons, the Convening Authority abused his discretion in excluding the period of time between 16 November 2011 and 15 December 2011. When these 30 days that were erroneously excluded are added to the 103 days that unquestionably count against the R.C.M. 707(a) 120-day speedy trial clock and the 10 days that were clearly improperly excluded by LTC Almanza, the Government failed to arraign PFC Manning within 120 days of the imposition of restraint. Therefore, the Government violated PFC Manning's R.C.M. 707 speedy trial rights.

m. The Sum of the Many Exclusions

244. Of the 635 days from the day after PFC Manning was placed into pretrial confinement up to and including the date PFC Manning was arraigned, *see* R.C.M. 707(b)(1), 532 days have been excluded by the Convening Authority and the Article 32 IO. This Motion does not challenge 205 days of those excluded days. *See* Argument, Part A.3, *supra*. Subtracting those 205 unchallenged days from the 635 total days, the Convening Authority and the Article 32 IO excluded 327 days of the 430 remaining days. Those exclusions amount to a total of over 76% of the 430 days. In practical terms, the Convening Authority and the Article 32 IO has excluded from the R.C.M. 707 speedy trial clock over 76% of the time that the Defense contends should be counted against that clock. It bears repeating that the Government has the burden of proof with respect to this Motion. The Government, in other words, must prove that the facts and

circumstances of this case show that excluding over 76% of the contested time during which PFC Manning was in pretrial confinement was reasonable.

245. If all of the challenged exclusions are upheld, this Court will have countenanced the exclusion of over 76% of days from the R.C.M. 707 speedy trial clock. This speedy trial provision was meant to address and protect the accused's constitutional and statutory speedy trial rights. *Thompson*, 46 M.J. at 475. If the exclusion of over 76% of days from the speedy clock is upheld, the speedy trial protections provided by R.C.M. 707 would be effectively eviscerated. *See United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005) (quoting and agreeing with military judge's concern that "the plain meaning of R.C.M. 707 may be thwarted if trial [was] allowed" in that case after "inordinate delay"); *cf. Bray*, 52 M.J. at 662 (lamenting that the Government's interpretation of a particular provision of R.C.M. 707 "would emasculate the speedy-trial provisions of R.C.M. 707.").

246. In *Bell*, a case involving an Article 10 violation premised upon a delay of 199 days between preferral of charges and trial, the Air Force Court of Military Review explained the findings of the military judge:

The military judge found, "there has been a significant delay in the processing of this case and the delay is by and large without explanation." He further found that the delay approached being "callously indifferent."

17 M.J. at 579. These words could not be more apt if spoken about this very case. To make matters worse, the Convening Authority, by rubber stamping every single one of the Government's eight delay requests, and the Article 32 IO, by excluding time that he simply did not work on the case with no legal basis for that exclusion, joined the Government in its callous indifference to PFC Manning's speedy trial rights. Whatever the protections of R.C.M. 707 may mean in the abstract, they must mean, if they mean anything at all, more than what PFC Manning was afforded in this case.

247. Therefore, in order to safeguard the protections that R.C.M. 707 is supposed to provide an accused and that were completely gutted by the Convening Authority's rubber stamp approval of any and all Government requests for delay, this Court must find that some or all of the challenged exclusions constituted an abuse of discretion. And if even just one or two of those periods was improperly excluded (and the Defense maintains that all challenged periods were improperly excluded), PFC Manning's R.C.M. 707 speedy trial rights have been violated.

5. Remedy: Dismissal With Prejudice

248. As mentioned above, *see Legal Framework*, Part A, *supra*, R.C.M. 707(d)(1) provides four factors to be balanced in determining whether the dismissal of the affected charges shall be with or without prejudice. Those four factors are "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." R.C.M. 707(d)(1). The appropriate balance of those factors leads to the conclusion that

only one remedy will suffice for the Government's flagrant disregard of PFC Manning's R.C.M. 707 speedy trial rights: dismissal of all charges with prejudice.

249. With regard to the first factor, the charges against PFC Manning are concededly serious. But the mere fact that the charges are serious in no way precludes dismissal with prejudice for a violation of R.C.M. 707(a)'s mandate. *See, e.g., Bray*, 52 M.J. at 660, 663 (dismissing charges with prejudice for a R.C.M. 707 violation even where dismissed charge alleged accused raped a 5-year-old girl). Rather, the seriousness of the charges is but one factor to be considered in the mix.

250. The remaining factors identified in R.C.M. 707(d)(1) all weigh heavily in favor of dismissal with prejudice. The facts and circumstances that lead to dismissal are grave indeed. The Government took 635 days to arraign PFC Manning after placing him in pretrial confinement. It took the Government 566 days after PFC Manning was placed into pretrial confinement to make itself ready for the Article 32 hearing. To be sure, the Defense did request some delay in order to conduct a R.C.M. 706 Board of PFC Manning. But the Defense's request was not a free pass to the Government to take it easy until the R.C.M. 706 Board completed its examination. Rather, the Government had an obligation to process the case in a reasonably diligent manner from the moment PFC Manning was placed into pretrial confinement to the moment PFC Manning was arraigned. Even after the R.C.M. 706 Board had run its course, the Government needed to request a period of delay every month until the Article 32 hearing commenced 566 days after PFC Manning was placed into pretrial confinement. Moreover, these requests were wholly lacking in reasons showing why the requested delay was reasonable. The facts and circumstances of the Government's processing of this case show anything but reasonable diligence. The Defense has found no reported case involving precisely what this case involves: an inordinate period of delay coupled with the Government's cavalier disregard of the accused's speedy trial rights. Therefore, this factor weighs in favor of dismissal with prejudice.

251. The "impact of re-prosecution on the administration of justice" factor also weighs heavily in favor of dismissal with prejudice. The Government will no doubt protest this contention strongly, arguing that barring prosecution in this case would prevent the Government from prosecuting the Soldier alleged to have perpetrated one of the largest leaks of U.S. information in history. We've heard the "this is such an important case" refrain before. However, the Government must finally face reality: if the Government is deprived of the opportunity of prosecuting PFC Manning, it will have no one to blame but itself for that result. Moreover, this third factor is a two sided coin. "[J]ustice is also frustrated when an accused is held in pretrial confinement for an unreasonably long time." *Proctor*, 58 M.J. at 797. Justice has already been irreparably frustrated by the inordinate Government delay in this case. Allowing the Government a second bite at the apple after it has so completely dropped the ball in processing this case in the first go-round would only compound that frustration. *See Dooley*, 61 M.J. at 264 ("[I]f the military judge dismisses without prejudice and the Government decides to re prosecute the accused, the remedy leads to further delay."). Therefore, this third factor also weighs heavily towards dismissal of all charges with prejudice.

252. Finally, as argued below, *see* Argument, Part B.4, *infra*, PFC Manning has already suffered substantial prejudice as a result of being denied his rights to a speedy trial. He suffered a long

period of oppressive pretrial confinement at the hands of the Quantico officials, being forced to endure MAX custody, POI status, and Suicide Risk restrictions during his time there. PFC Manning has suffered substantial anxiety and concern as a result of his pretrial confinement. Lastly, the preparation of PFC Manning's defense has been prejudiced by the inordinate delay, as the Government's lack of diligence has likely led to the loss of evidence and has further compounded the already staggering delay in bringing PFC Manning to trial. All of these aspects of prejudice are discussed in much more detail below. *See* Argument, Part B.4, *infra*. For present purposes, it suffices to say that PFC Manning has suffered a substantial amount of prejudice to all three interests identified by the Supreme Court in *Barker*. Therefore, this final factor also points strongly towards dismissal of the charges with prejudice.

253. In sum, three of the four R.C.M. 707(d)(1) factors clearly militate in favor of dismissal of the affected charges with prejudice. Indeed, dismissal with prejudice is the only acceptable remedy for the Government's profound disregard for PFC Manning's speedy trial rights.

254. Furthermore, where, as here, the accused's constitutional or Article 10 speedy trial rights have been violated, the only available remedy is dismissal with prejudice. *See* R.C.M. 707(d)(1); *Kossmann*, 38 M.J. at 262 (explaining that the only remedy for an Article 10 violation is dismissal of the affected charges with prejudice); *see also* Argument, Part B, *infra* (arguing that PFC Manning's Article 10 and Sixth Amendment rights to speedy trial have been violated).

255. For these reasons, this Court should dismiss all charges with prejudice, as PFC Manning's R.C.M. 707 speedy trial rights have been severely trampled upon.

B. The Government Violated PFC Manning's Speedy Trial Rights Under Article 10 and the Sixth Amendment to the United States Constitution

256. The Government has also violated PFC Manning's speedy trial rights under Article 10 and the Sixth Amendment to the United States Constitution.²¹ As of the date of this motion, PFC Manning will have spent 845 days in pretrial confinement before his trial commences. This staggering period of delay is unquestionably facially unreasonable under the length of delay factor, triggering the remainder of the Article 10 analysis. Moreover, the various excuses for this monstrous delay that the Government may put forth are all red herrings, meant to detract from the two undeniable truths that permeate this case: the Government has been dragging its feet in the processing of this case from day one and the Government was inexcusably operating under a profound misunderstanding of its bedrock discovery obligations for the first 698 days of this case. Additionally, the Defense made two genuine speedy trial requests early on in this odyssey, and it has reiterated those requests on numerous occasions throughout the case. Finally, PFC Manning has suffered severe prejudice to all three interests identified by the Supreme Court in *Barker* and the Court of Appeals for the Armed Forces in *Cossio* and *Mizgala*.

²¹ Since the *Barker* factors under the Sixth Amendment have been adopted by the Court of Appeals for the Armed Forces as "an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation," *Mizgala*, 61 M.J. at 127, to avoid unnecessary repetition, this section covers PFC Manning's speedy trial claims under the Sixth Amendment and Article 10.

257. In sum, all four factors in the Article 10 procedural framework point unmistakably to the conclusion that PFC Manning's statutory and constitutional speedy trial rights have been trampled upon with impunity. Under no stretch of the imagination could the Government's processing of this case be characterized as reasonably diligent. There is only one remedy for the Government's severe constitutional and statutory violations: dismissal of all charges with prejudice.

1. Length of Delay

258. To date, PFC Manning has spent 845 days in pretrial confinement. The 845 days PFC Manning has already spent in pretrial confinement dwarfs other periods of pretrial confinement that the Court of Appeals found to be facially unreasonable, and it is plainly sufficient to trigger the analysis into the remaining factors in the Article 10 framework. Indeed, the Defense has found no reported military case involving a period of delay even close to the 845 delay in this case.

259. The protections of Article 10 are triggered when the accused is placed in "arrest or confinement." 10 U.S.C. § 810; *see Schubert*, 70 M.J. at 184. Article 10 was implicated in this case when the Government placed PFC Manning in pretrial confinement on 29 May 2010. Moreover, Article 10's protections last until the accused is tried. *See Cooper*, 58 M.J. at 49-60. Currently, PFC Manning's trial is scheduled to commence on 4 February 2013. Therefore, for purposes of Article 10, PFC Manning will have been in "arrest or confinement" for a period of 983 days when his trial begins.²²

260. This 852 day delay is clearly facially unreasonable. Applying the factors identified by the *Schubert* Court, the Defense concedes that the charged offenses are serious and that PFC Manning was notified of the charges against him. *See* 70 M.J. at 188. Additionally, while this case may be more complex than the run-of-the-mill prosecution, *see id.*, much of that complexity has been created by the Government's expansive charging decision. *See, e.g.*, Appellate Exhibit XC (arguing that Government was relying on an untenable expansive theory of "exceeds authorized access"); Appellate Exhibit XCII (same); Appellate Exhibit CLXX (same); Appellate Exhibit CXC VII (same); Appellate Exhibit LXII (arguing that Government's expansive interpretation of the term indirectly was untenable and, as applied in this case, rendered Article 104 unconstitutionally vague and substantially overbroad). PFC Manning's Article 10 rights cannot be made dependent upon the unlucky circumstance of having an imaginative prosecutor assigned to his case. *See* Argument, Part B.2.a, *infra* (further explaining the Government's responsibility for this case's complexity).

261. Finally, the Government may attempt to seek shelter behind the "availability of proof" factor identified in *Schubert*, *see* 70 M.J. at 188, arguing that the proof was not as readily available in this case as in some cases, given the volume of classified evidence implicated by this

²² This motion uses the period of pretrial confinement to the date of this motion for purposes of the Article 10 argument. The Defense points out, however, that this figure (845) will continue to increase each day until this motion is litigated and decided. In the event that this Court denies the motion to dismiss with prejudice and the case proceeds to trial as scheduled, the entirety of the 983 day period in which PFC Manning will have spent in pretrial confinement by 4 February 2013 will constitute the period of pretrial delay for purposes of Article 10.

case. However, the Government has had ample time to allow the OCAs to conduct the classification review process, to obtain consent from the OCAs to release discoverable information to the Defense, and to conduct its required *Brady* searches. From PFC Manning's placement in pretrial confinement to the Government's 25 April 2011 request for delay of the Article 32 hearing – its first of eight such requests – the Government already had a period of 332 days in which to get its affairs in order with respect to the classified evidence in this case. Moreover, the Government needed an additional 235 days after 25 April 2011 before it was even ready for the Article 32 hearing. Furthermore, as of the date of this motion, the Government has *still* not finished conducting its basic *Brady* searches of the files within its possession, custody, or control, 845 days after PFC Manning was placed in pretrial confinement and 808 days after the original charges were preferred. Therefore, the Government cannot hide its profound lethargy behind the fact that this case involved classified evidence. See Argument, Part B.2.ii, iv (further explaining the Government's inexplicable discovery delay).

262. The remaining *Schuber* factors weigh in favor of finding this 845 day period of PFC Manning's pretrial confinement to be sufficiently lengthy to trigger the remainder of the Article 10 analysis. First, the Government has not properly complied with the procedures relating to PFC Manning's pretrial confinement. See *Schuber*, 70 M.J. at 188. When PFC Manning was transported to Quantico, for example, the Duty Brig Supervisor (DBS) completed an initial custody classification determination. Appellate Exhibit 258, at 4. Despite the fact that PFC Manning's score of "5" was substantially lower than the "12" or more points that are typically required for a detainee to be placed in MAX custody, the DBS overrode the custody determination and placed PFC Manning in MAX custody. *Id.* Moreover, despite the recommendations of two Brig psychiatrists that PFC Manning be downgraded from Suicide Risk to POI status, the Brig did not immediately remove PFC Manning from Suicide Risk designation. *Id.* at 4-5. This failure to take prompt action following the psychiatrists' recommendations violated Secretary of Navy Instruction (SECNAVINST) 1640.9C. *Id.*; see *id.* at 35 ("In CWO5 Abel Galaviz's investigation of the conditions of PFC's Manning's confinement, he found that the failure to immediately take PFC Manning off of Suicide Risk status upon the psychiatrist's recommendation was in violation of Navy rules."). Likewise, for the next eight months that PFC Manning was at Quantico, Brig officials repeatedly ignored the recommendations of the Brig psychiatrists that PFC Manning should be taken off of POI status. *Id.* at 11. Similarly, on the two occasions when the Brig increased PFC Manning's handling instructions to be compatible with those of a Suicide Risk detainee, Brig officials either ignored or simply did not consult the Brig's mental health providers. *Id.* at 27, 35-36. Additionally, the Classification and Assignment Board, which apparently met on a weekly basis to discuss PFC Manning's confinement conditions, failed to properly document its recommendations on the required Brig Form 4200 for over five months. *Id.* at 27. Finally, and most egregiously, Col. Robert G. Oltman, the Security Battalion Commander and senior rater of the Brig Commander, indicated at a 13 January 2011 meeting that there would be no relaxation of the restrictions of PFC Manning's confinement "on [his] watch," notwithstanding the dissenting views of the Brig's medical health personnel, because he believed that the Brig could do whatever it wanted to do when it came to PFC Manning's confinement. *Id.* at 37-38. Col. Oltman was obviously simply relying on an order from LtGen. George J. Flynn, the Commanding General of Marine Corps Combat Development Command at Quantico. The 84 emails provided by the Government on (literally) the eve of the Defense's Article 13 filing expose that everybody at Quantico, from a

three-star-general to lower enlisted marines at the brig, was complicit in the unlawful pretrial punishment of PFC Manning.

263. Second, the Government was wholly unresponsive to requests for reconsideration of PFC Manning's pretrial confinement. See *Schuber*, 70 M.J. at 188. PFC Manning, through counsel, made numerous requests of the United States Army Staff Judge Advocate's Office for the Military District of Washington to assist in removing PFC Manning from MAX and POI. Appellate Exhibit 258, at 47. While giving vague assertions that the Government was giving these concerns the "highest priority," email correspondence between then-CPT Fein and the Brig officials demonstrates that the Government was not at all concerned with seeing PFC Manning's confinement conditions reconsidered, but was instead solely concerned with combating a potential Article 13 Motion. *Id.* at 47-50. Moreover, PFC Manning filed numerous complaints about his pretrial confinement and requests to have his confinement conditions reconsidered – a complaint with the Quantico Brig Commander, a DD Form 510 complaint through the Brig's grievance process, a request for release from pretrial confinement under R.C.M. 305(g), a request for redress under Article 138 and two rebuttals of the inadequate responses to this request, to be precise – all to no avail. *Id.* at 49. The responses to these numerous requests and complaints were either nonexistent or inadequately explained, cursory denials. *Id.* Additionally, as a result of the domestic and international outrage at PFC Manning's inhumane treatment, several organizations and individuals pleaded with the Government to modify the conditions of his confinement. *Id.* at 38-41. All such pleas, like the several requests and complaints lodged by PFC Manning himself, fell on deaf ears.

264. Finally, a comparison of the time PFC Manning has spent in pretrial confinement and the periods of pretrial confinement found to be sufficiently facially unreasonable to trigger the remaining Article 10 analysis readily demonstrates that the 845 days of pretrial confinement in this case easily qualifies as facially unreasonable. Indeed, the 845 days of pretrial confinement dwarfs the periods of pretrial confinement in any reported military case. See, e.g., *Thompson*, 68 M.J. at 312 (holding that "the 145-day period [the accused] spent in pretrial confinement is sufficient to trigger an Article 10 inquiry"); *Cossio*, 64 M.J. at 257 (explaining that where the accused "had been in continuous pretrial confinement for 117 days," the length of delay was sufficient to trigger the remaining Article 10 analysis); *Mizgala*, 61 M.J. at 123, 129 (conducting full Article 10 analysis when the accused was in pretrial confinement for 117 days); *Miller*, 66 M.J. at 574 (finding 140 delay to weigh "significantly against the Government"); see also *Kossman*, 38 M.J. at 261 ("We happen to think that 3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and we think Congress thought so, too. Four months in the brig is even longer. We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90 – or 120 – days is involved."); cf. *Hatfield*, 44 M.J. at 23-24 (affirming military judge's determination that Government violated Article 10 based primarily on five periods of delay totaling 48 days); *Laminman*, 41 M.J. at 518-19, 523 (affirming military judge's determination that Government violated Article 10 based on a delay of 109 days); *United States v. Collins*, 39 M.J. 739, 741 (N.M.C.M.R. 1994) (affirming military judge's determination that Government violated Article 10 based on a period of pretrial confinement of 88 days); *United States v. Hayes*, 16 M.J. 636, 638 (A.F.C.M.R. 1983) (finding delay of 466 days "unacceptable," even where no pretrial confinement and observing that it was "inconceivable that the processing was not done more expeditiously."). As an additional basis

for comparison, the 845 day period of PFC Manning's pretrial confinement is almost twelve times longer than the 71 day period of pretrial confinement that the *Schuber* Court found to be not facially unreasonable. See 70 M.J. at 187-89.

265. In sum, no reported military case has involved such a staggering period of pretrial confinement. If periods of 117 days and 145 days have been held to be sufficiently lengthy to trigger the remainder of the Article 10 analysis, surely the 852 day period in this case qualifies as facially unreasonable. Therefore, this first factor must be resolved in favor of PFC Manning.

2. Reasons for Delay

266. As of the date of this motion, the Government's case against PFC Manning has been ongoing for 845 days. For the entirety of that time, PFC Manning has remained in pretrial confinement. With trial scheduled to commence on 4 February 2012, PFC Manning will have spent a total of 983 days in pretrial confinement before the trial against him even begins. This marathon period of pretrial confinement is tremendous, to say the least.

267. But since the Government always seems to have some excuse for all of its many missteps along the way, the Defense suspects that the Government will respond to this motion with a smorgasbord of excuses in a vain attempt to justify the astounding period of pretrial delay in this case. This Motion anticipates and responds to a few of these potential excuses in this section.²³ Because there are essentially two distinct tracks of Government delay in this case – delay of the Article 32 hearing and discovery delay – this Motion addresses the various potential Government excuses for each type of delay in different subsections below.

268. Every conceivable excuse offered by the Government is simply a red herring designed to detract this Court's attention from the ugly truth of this case: the Government was operating for almost two years under a profound misunderstanding of its bedrock discovery obligations and the Government was incredibly lethargic in processing this case on all fronts. All the excuses under the sun fail to justify why, after PFC Manning has spent 845 days in pretrial confinement, the Government is still not ready for trial. A delay of 845 days is simply intolerable. Accordingly, the "reasons for delay" factor of the procedural framework also weighs in favor of PFC Manning.

a. Delay of the Article 32 Hearing

269. It took the Government 566 days after PFC Manning was placed in pretrial confinement before it was ready for the Article 32 hearing. Even if this Court upholds the many challenged exclusions from the R.C.M. 707 speedy trial clock that occurred during this period, the Government still has the burden to show reasonable diligence for this time period for purposes of Article 10 and the Sixth Amendment. See *Lazauskas*, 62 M.J. at 42; *Mizgala*, 61 M.J. at 128-29; *Birge*, 52 M.J. at 211; *Kossmann*, 38 M.J. at 261; *Calloway*, 47 M.J. at 787; see also Legal Framework, Part B.2, *supra*. The Government may offer a number of reasons for this delay,

²³ The Defense has anticipated these potential excuses from the Government's court filings and emails. As the Government may offer reasons not anticipated here by the Defense in the Government's Response to this Motion, the Defense reserves the right to address any new reasons offered by the Government in a reply motion.

many of which are discussed or hinted at above, *see* Argument, Part A.4.e-1, *supra*. No reason can sufficiently explain the Government's inexcusable failure to get its affairs in order for the Article 32 hearing until 566 days went by.

270. First, the Government may attempt to pin some of the blame for the delay on the Defense. After all, the Government might say, the Defense requested delay in the Article 32 hearing in order to conduct a R.C.M. 706 Board. However, while it's true that the Defense did request such a delay, this fact has no bearing on the issue of whether the Government diligently processed this case. From day one of PFC Manning's pretrial confinement, the Government had regulatory, statutory, and constitutional duties to proceed to trial with reasonable diligence. During the lead up to the R.C.M. 706 Board through the completion of the Board's evaluation, the Government's duty to process the case with reasonable diligence remained in full effect. It could not simply take a 205 day "timeout" from processing the case simply because the Defense had requested some delay to complete a R.C.M. 706 Board. Taking such a timeout would in itself establish a lack of reasonable diligence in proceeding to the Article 32 hearing.

271. Of course, the Government will assert that it took no such timeout. In fact, the Government's representations to the Convening Authority indicate that the Government began the classification review process by reaching out to the OCAs on 17 June 2010²⁴ and that it was "continuing" to work with the OCAs right up until the Article 32 hearing. If true, these representations show why the fact that the Defense requested a R.C.M. 706 Board provides no justification for the Government's delay in preparing for the Article 32 hearing: the Defense request had no effect on the Government's classification review process, which was ongoing at the time the request was made. Therefore, given that the Government requested delay in the Article 32 hearing about once a month for a continuous period of 8 months, it is abundantly clear that the Government would have needed to begin those delay requests earlier if the Defense had never made the R.C.M. 706 Board request. In other words, because the Government has represented that it was "continuing" to work on the classification review process since 17 June 2010 right up until December 2011 and because it still, even after the 205 days of delay stemming from the R.C.M. 706 Board process, needed to request delays of the Article 32 hearing eight times between 22 April 2011 and 16 November 2011, it is clear that the only thing that would have changed had the Defense not made its R.C.M. 706 Board request would be the number of Government requests for delay from 11 August 2010 to 16 November 2011. Thus, the Government cannot base any of its 566 days of delay in the Article 32 hearing on the Defense request for a R.C.M. 706 Board. *See United States v. Cole*, 3 M.J. 220, 225 (C.M.A. 1977) ("While defense-requested delays or continuances generally are attributable to the defense as the party which benefits therefrom, a showing that the prosecution could not have proceeded any earlier at any rate compels the conclusion that the defense-requested 'delay' did not in fact delay the proceedings at all and the responsibility for the pertinent time period remains where it started: on the shoulders of the Government.").

272. Second, the Government could claim, as it did repeatedly in its eight requests for delay, that the classification review process was so lengthy because of the volume of classified

²⁴ Once again, however, the Defense notes that the Government has offered no explanation of why it waited 19 days after PFC Manning was placed in pretrial confinement before first reaching out to the OCAs to begin the classification review process.

information that needed to be reviewed. While this reason may justify some delay, it cannot even begin to justify all 566 days of delay of the Article 32 hearing. For one thing, as mentioned above, *see* Argument, Part A.4.e-1, *supra*, many of the classification reviews of this allegedly voluminous amount of classified information are quite brief. Of the ten completed classification reviews provided, six were four pages or less in length. *See* Facts, Part A.2, *supra*. Of the remaining four classification reviews, only three were more than 12 pages in length and only one was over 30 pages in length. *See* Facts, Part A.2, *supra*. While the Defense understands that length of a finished product is not the sole factor in determining a task's complexity, the fact that many of the classification reviews are only a few pages in length casts serious doubt on the Government's assertion that the classification review process was so overwhelming. For another thing, there is a large unexplained gap, ranging from a few months up to over a year and two months, between the completion dates for some of the classification reviews and their disclosure to the Defense. The Defense believes that the Government may have been stockpiling completed classification reviews so that it could still plausibly claim that the classification review process was ongoing. Whether the Government actually engaged in this practice, however, is beside the point. The bottom line is that there was a substantial delay between the completion of the classification reviews and either their disclosure to the Government by the OCAs or their disclosure to the Defense by the Government. Either way, there is a period of unexplained delay and that delay was caused by some arm of the United States Government. Finally, even if the amount of classified information to be reviewed was indeed voluminous, the Government cannot deny the fact that it took 566 days after PFC Manning was placed in pretrial confinement before it was ready to proceed to the Article 32 hearing. Therefore, to the extent that the Government intends to simply use "voluminous amounts of classified information" as some type of magic phrase, the Defense fires "566 days" right back.

273. Third, the Government may argue that the classification review process was prolonged in this case because of the necessity of coordinating with the various OCAs. Taking this contention a step further, the Government may assert that its entire case preparation was bogged down by the need to coordinate with the several different government agencies involved in this case. This "reason" for delay is more cry than wool. At no point in its many requests for delay has the Government explained how the necessary coordination in this case was especially burdensome. As mentioned above, *see* Argument, Part A.4.e-1, *supra*, the fact that the Government needed to coordinate with other governmental agencies does not itself justify any period of delay. *Cf. Kuelker*, 20 M.J. at 716-17 ("[T]he need to obtain crucial evidence in the custody of another agency of the United States is a common problem and therefore associated delay does not qualify for exclusion from the 120-day rule as a 'delay for good cause.'").

274. At the end of the day, the Government had the resources of the United States at its disposal from day one. Specifically, this meant that the Government had five full time prosecutors, two warrant officers, and multiple enlisted paralegal support assigned to this case, with the ability to call on numerous additional lawyers and paralegals from the SJA's office to help with the processing of this case. With all of these resources, any claim by the Government that coordination with the many entities involved in this case was overwhelming should be scrutinized carefully. Are we really to believe that the Government was overwhelmed by its coordination efforts when it had the ability to summon countless SJA attorneys and paralegal support to assist in the preparation of this case? Should PFC Manning be made to suffer because

the entity that is prosecuting him – the United States of America – is having difficulty coordinating amongst its many subparts? If the standard of reasonable diligence has any teeth whatsoever, the answers to these questions must be no. Moreover, to the extent that Government is simply attempting to impress this Court with the sheer number of OCAs and other entities with which it needed to coordinate, the Defense would stress that the sheer length of delay – 566 days – makes that coordination decidedly less impressive.

275. Finally, the Government may fall back on its oft-repeated, yet never fully explained, excuse of complexity. Throughout the processing of this case, the Government has stressed that this case is somehow unique or one of a kind as a result of its extreme complexity. While the Defense recognizes that this case is not your ordinary court-martial, the Government cannot repeatedly utilize the complexity excuse as some get-out-of-diligence-free card.

276. As an initial matter, each time the Government raises the “complexity” defense to hide its lack of diligence it neglects to acknowledge the undeniable fact that the Government’s own charging decision has substantially contributed to the complexity of this case. The Government referred 22 charges against PFC Manning. Several of these charges appear to rely on expansive interpretations of the penal statutes under which PFC Manning has been charged. To recap just a few of these complex charging decisions, consider the specifications alleging violations of 18 U.S.C. Section 1030(a)(1). These specifications depend on an expansive interpretation of the phrase “exceeds authorized access.” *See generally* Appellate Exhibit XC; Appellate Exhibit XCII; Appellate Exhibit CLXX; and Appellate Exhibit CXCVII. Moreover, even after referral of the charges, the Government was still unable to articulate its precise theory under which it had charged PFC Manning with “exceeding authorized access.” *See* Appellate Exhibit XC, at 2-4, (explaining the Government’s reluctance to articulate its theory on how PFC Manning exceeded his authorized access). What’s more, once the Government finally did articulate its “definitive theory” for “exceeds authorized access,” it quickly shifted ground at the first sign of court resistance to its initial definitive theory. *See* Appellate Exhibit CLXX, at 2-3 & n.1 (explaining the Government’s overdue articulation of its self-titled “definitive” theory of “exceeds authorized access,” followed quickly by its abandonment of that theory for an alternative theory). That the Government, 742 days after PFC Manning was placed into pretrial confinement, 705 days after referral of charges, and 127 days after referral of charges, was having so much difficulty ironing out its own theory of the Section 1030 specifications speaks volumes about both the Government’s self-created complexity and its overall lack of diligence.

277. To make matters worse, Section 1030 was not the only section that the Government needed to have interpreted expansively in order to reach PFC Manning’s alleged conduct. The Government’s theory underlying its Article 104 specification – the Specification of Charge I – also depended on an expansive interpretation of a criminal statute. This time, the Government needed the phrase “indirectly” to be interpreted so that a person could be found to have indirectly given intelligence information to the enemy when that person gave the information to a third party with the knowledge that the enemy might be able to access that information. *See* Appellate Exhibit LXII. As explained in the Defense Article 104 Motion to Dismiss, no court had ever accepted such an expansive interpretation of that phrase. *Id.* Additionally, the Government has been less than forthcoming with the theories underlying some of the other specifications in this case. For example, despite a bill of particulars request covering the Government’s theories

underlying the 18 U.S.C. Section 641 specifications, the Government refused to articulate its theory of how PFC Manning stole or knowingly converted Government databases that remained in the possession of the United States. While at the time the Defense believed the Government was just engaging in some improper gamesmanship, the Defense now believes, in light of the Government's confusion over its own "exceeds authorized access" theory (or theories), that the Government simply did not yet have an articulable legal theory for the theft or knowing conversion specifications.

278. The point of this discussion is not to rehash memories of long ago motions hearings. Rather, the Defense merely wishes to point out that the Government cannot assert that this case is overly complex or that it raises novel issues while simultaneously turning a blind eye to the fact that a substantial portion of that complexity and novelty has been caused by the Government's own charging decision. In other words, the Government cannot be given a free pass on the reasonable diligence inquiry simply by asserting the complexity of the case, especially when it has charged the case in such a complex manner that necessitated delay in the proceedings to allow the Government to mull over how it can make the proof fit its lofty and imaginative charging decision. As explained above, *see* Argument, Part B.1, *supra*, PFC Manning's speedy trial rights cannot hinge upon the unfortunate circumstance of having an imaginative prosecutor assigned to his case. Therefore, to the extent that case complexity is a reason offered by the Government for its profound delay in processing this case, this Court should discount any self-inflicted complexity from the weight given to that reason.

279. Furthermore, even if some residual amount of complexity exists in this case (i.e. complexity that was not created by the Government's charging decision), that complexity can only get the Government so far. Indeed, the sheer length of delay in this case prevents the Government from waving the complexity flag as triumphantly as it attempts to. While case complexity may be a valid reason for reasonable delay in the abstract, the delay here is so astounding that not even vague calls of "complexity" can rescue this case from the chopping block. Once again, 566 days passed between the date PFC Manning was placed into pretrial confinement and the Government was finally ready for the Article 32 hearing to commence. No matter the complexity of a given case, the Government's team of five full time prosecutors, along with an arsenal of additional SJA attorneys and paralegals waiting in the wings, could have been ready for the Article 32 investigation much sooner, if only it had been reasonably diligent in processing the case.

280. At bottom, the true cause of the Government's repeated requests for delay in the Article 32 hearing seems to be that the Government was simply stuck too long in a waiting posture. The *Mizgala* Court, though not finding an Article 10 violation based on the 117 days of delay in that case, nevertheless expressed grave concern about the Government being in a "waiting posture:"

The processing of this case is not stellar. We share the military judge's concern with several periods during which the Government seems to have been in a waiting posture: waiting for formal evidence prior to preferring charges and waiting for a release of jurisdiction for an offense that occurred in the civilian community. There are periods evidencing delay in seeking evidence of the off-

post offense and seeking litigation packages to support prosecution of the drug offenses.

61 M.J. at 129.

281. Here, the Government appears to have been in some type of waiting period for most of the 566 days before the Article 32 investigation began. While the Government was quick to tell the Convening Authority that it had contacted the OCAs on 17 June 2010 and that it was “continuing” to work with the OCAs thereafter, the Government offered no specifics of what it was actually doing in the 566 days it took for the classification review process to be completed. The most likely scenario seems to be that the Government was simply waiting around for the OCAs to finish up the classification reviews. Article 10 does not permit the Government to sit idly by while an accused languishes in pretrial confinement.

282. Additionally, lengthy periods of inactivity weigh heavily against the Government in an Article 10 analysis. For example, in *Calloway*, the Navy-Marine Court of Criminal Appeals reversed the military judge’s conclusion that the Government did not violate Article 10 in trying the accused after he had been in pretrial confinement for 115 days. 47 M.J. at 787. In finding an Article 10 violation, the *Calloway* Court was particularly troubled with a 20-day period of apparent Government inactivity: “There is no evidence explaining why, during the first 20 days of the appellant’s pretrial confinement, the Government did absolutely nothing with a view toward prosecution.” *Id.* at 785. Similarly, the *Hatfield* Court, in affirming the military judge’s determination that the Government violated Article 10 based primarily on five periods of inactivity that totaled 48 days, quoted approvingly the military judge’s prime concerns that the Government had essentially brought the case to a standstill:

Yeah, but what the Government has done is just bring the processing of the case to a complete stop. It’s not like they’re gathering evidence and preparing for a[n Article] 32 [pretrial investigation]. The Government tells itself that everything is stopped, we’re not proceeding anywhere. We’re not going to proceed to the 32, we’re not going to assign counsel, we’re not going to identify an IO so the appointing letter can be done, so things can get moving. What we’re going to do is we’re going to come to a complete stop in activity because we’re not satisfied we have a couple of documents that we need. You have a viable preferral which the command wants to go to a 32 and the Government says, “No, we’re not going to do anything with this until you get a couple of documents.” So, that’s the problem I have with that period of time. I mean, the Government has stopped processing the case basically.

44 M.J. at 24 (alterations in original).

283. Here, there are several lengthy periods of Government inactivity taking place prior to preferral. Those periods, which have been chronicled above, *see* Facts, Part A.4, *supra*, need not be laid out once again here. The total of these periods added up to 323 days, far more than the 48 days that troubled the military judge and the Court of Military Appeals in *Hatfield* and the 20 days that bothered the *Calloway* Court. In fact, each of the 13 periods of inactivity are

comparable to the 20-day period of inactivity in *Calloway*; the periods vary in length from 12 days to 36 days, and all are longer than 16 days with the exception of one 12-day period. These several periods of inactivity weigh heavily against the Government in the reasonable diligence inquiry.

284. In the end, “[w]hen an accused has been confined for a lengthy period, as in this case, reasonable diligence may call for expeditious processing.” *Laminman*, 41 M.J. at 522 n.4. The Government’s processing of this case falls far short of this mark.

285. For these reasons, no excuse the Government can muster can sufficiently explain why the Government was unable to proceed to the Article 32 hearing before PFC Manning spent 566 days in pretrial confinement. Therefore, with respect to any delay of the Article 32 hearing, the second factor in the Article 10 framework and Sixth Amendment analysis must be resolved in PFC Manning’s favor.

b. Discovery Delay

286. At the time of this motion, PFC Manning has been in pretrial confinement for 845 days. It has been 808 days since charges were originally preferred and 230 days since charges were referred to this Court. Despite these long periods of delay, the case is *still* languishing in the discovery phase. The Defense is *still* awaiting critical discovery. The Government is *still* conducting its *Brady* searches. This delay is intolerable.

287. The Government, never being short on excuses, will no doubt have some at the ready to explain its staggeringly slow pace of discovery. Any excuse offered by the Government is a mere cover-up attempt. No matter what the Government offers in its defense, there is simply no way to explain away the Government’s inexcusable failure to understand its discovery obligations and how the discovery rules operate in a classified evidence case. It is this failure, and not the many reasons that the Government may point to in an attempt to divert attention away from the storm cloud that has hovered over this case’s discovery stage, that has caused the Government’s profound delay in providing discovery to the Defense.

288. As if the Government’s inexplicable misunderstanding of the discovery ground rules were not enough, the Government has maintained several untenable legal positions in a childish attempt to withhold as much discovery as possible. These frivolous positions, apart from being contrary to the liberal tenor of the discovery rules in military practice, have further compounded the delay. Finally, several discrete instances of Government discovery delay hammer home the undeniable fact that the Government has simply fallen far short of the reasonable diligence benchmark in the processing of this case.

289. Thus, the second factor in the Article 10 procedural framework and the Sixth Amendment analysis must be resolved in favor of PFC Manning.

i. Government’s Potential Reasons for Delay

290. The Government may offer some excuses for its inexcusable discovery delay. Some of those excuses are addressed below.²⁵ No excuse can justify the mammoth delay in the processing of this case.

291. The Government will no doubt attempt to justify its discovery delay by clinging to the prized possession of its veritable cache of excuses: case complexity. As applied to the discovery context, the excuse will likely take the form of something like the following: “The discovery process in this case was unduly time consuming given the complexity of this case, which stems from the accused’s misconduct, the volume of classified information implicated in that conduct, and the number of OCAs, equity holders, aligned entities, and other government agencies and entities involved with this case.” This “reason” for delay, while nicely varnished, cannot excuse the Government’s legendary discovery delay.

292. As an initial matter, the Government’s generalized assertion of case complexity has been less than forthright, since the Government bears a significant amount of responsibility for any complexity that this case may involve. *See* Argument, Part B.2.a, *supra*. Without rehashing what’s already been argued, the Government’s charging decision injected much of the complexity that the Government is always complaining about. Therefore, to the extent that the complexity of this case has bogged down the Government’s discovery efforts, the Government must be held to task for the consequences of the complexity it created for itself.

293. Additionally, as mentioned above, *see* Argument, Part B.2.a, *supra*, case complexity does not equate to a free pass on the reasonable diligence inquiry. Even in a complex case, the Government must still proceed with reasonable diligence. That case complexity may make discovery time consuming doesn’t get the Government very far. The extent to which some task is time consuming is, after all, relative to the expediency at which one operates. For one who moves at a snail’s pace, tying one’s shoes is time consuming. The Government appears to use the “time consuming task” label as way to sidestep its lack of diligence, all the while overlooking (purposefully or not) the elephant in the room: the Government’s astoundingly lethargic pace of action. PFC Manning has been in pretrial confinement for the last 845 days, and the Government has still not yet finished conducting its *Brady* searches, a prerequisite to bringing PFC Manning to trial. No matter the complexity of a case, the Government’s failure to wrap up its *Brady* searches after 845 days is not and cannot be reasonably diligent.

294. In addition to its case complexity excuse, the Government may attempt to deflect attention from the sheer length of delay by pointing out that charges were not referred until 3 February 2012 and arguing that “the defense does not have a right to discovery prior to referral under RCM 701 or *Brady*.” Appellate Exhibit CLXXII, at 2. This excuse for delay is wholly unavailing.

295. For one thing, it misstates the law. While some discovery rules note the significance of the date that charges are referred, R.C.M. 701(a)(6) – the rule the Government thought was inapplicable to a classified evidence case until this Court set it straight on 25 April 2012, 698

²⁵ Again, these potential excuses have been gleaned from the Government’s many filings and emails in this case. To the extent the Government responds to this motion by raising other excuses for its discovery delay, the Defense reserves the right to address these new excuses in a reply motion.

days into this case, *see* Appellate Exhibit LXVIII, at 2 – makes no reference to the date of referral. Rather, that rule directs the Government to provide discovery within the rule’s reach to the Defense “as soon as practicable.” R.C.M. 701(a)(6).

296. For another thing, this Government excuse, even if correct as far as the Defense’s right to discovery goes (which the Defense does not in any way concede), is terribly misleading. The overarching requirement of reasonable diligence in the speedy trial context does not start merely when charges are finally referred; that reasonable diligence duty begins when the accused is put in pretrial confinement. *See* 10 U.S.C. 810 (“When any person subject to this chapter is *placed in arrest or confinement prior to trial*, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.” (emphasis supplied)); *Schuber*, 70 M.J. at 184. Therefore, the Government was required to be reasonably diligent in its prosecution of PFC Manning from the moment he was placed into pretrial confinement. The Government appears to have made no real effort to search for discoverable material until referral of the charges. That period – almost two years – was an incredibly long one. It was not reasonably diligent to wait so long to tackle its *Brady* and R.C.M. 701(a)(2) responsibilities, an inevitable obligation in any criminal prosecution.

297. Additionally, the Government is attempting to use this late referral justification in conjunction with its repeated refrain of “complexity” and “uniqueness” of the case, to get a pass on its botched discovery efforts. This attempt should be recognized as fruitless for two reasons. First, the late date of referral was itself the product of the Government’s baseless and unsupported requests for delay in the Article 32 proceedings. Had the Government been diligent in its Article 32 preparation, the charges would have been referred much earlier than February 2012. *See* Argument, Part A.4.e-i, *supra*; Argument, Part B.2.a, *supra*. Second, the real reason for the Government’s pathetic discovery showing cannot seriously be overlooked: the Government did not understand its discovery obligations from the outset of the case. *See* Argument, Part B.2.b.ii, *infra*. That failure is as astounding as it is unforgivable. A criminal defendant’s right to speedy trial cannot be cast on the back burner by the need to bring his prosecutors up to speed on the bedrock discovery obligations of a prosecutor. Just as a defendant’s speedy trial rights cannot be made to hinge on the unfortunate circumstance of having a creative or imaginative prosecutor assigned to his case, *see* Argument, Part B.2.a, *infra*, so too should a defendant’s fundamental speedy trial rights not be made to suffer from the delay occasioned by having an inept prosecutor assigned to the case. In this respect then, this “date of Defense’s discovery rights” nonsense must be seen for what it truly is: an illegitimate, post hoc justification for the Government’s inordinate discovery delay, which was caused primarily by the Government’s inexcusable failure to understand its discovery obligations and how discovery rules operated in a classified evidence case.

298. The final reason for its discovery delay that the Government may muster might be the astounding position that the Defense itself has caused the discovery delay by filing too many motions. *See* Appellate Exhibit CLXXII, at 4 (“[T]he defense raises anew complaints of the timing of receiving discovery without regard to the motions it has submitted to the Court.”); *id.* at 4 n.6 (“The numerous and unanticipated defense motions have affected the trial date.”). This contention is nothing short of absurd.

299. While the Government may prefer that those who come under the aim of its prosecutorial crosshairs go quietly into the night, the United States Constitution permits a defendant to do otherwise. PFC Manning has exercised his constitutional right to defend himself by taking issue with several aspects of the Government's case, including the drafting of the charges against him, the validity of the legal theories underlying those charges, and the Government's various untenable discovery positions. These Defense motions were not part of some elaborate conspiracy to sow the seeds for a successful speedy trial motion. Rather, they were legitimate, nonfrivolous challenges to the Government's case against PFC Manning. PFC Manning cannot be punished for the exercise of his constitutional right to defend himself, especially where the necessity of taking issue with several aspects of the Government's case against him was occasioned by the Government's own conduct. *See* Argument, Part B.2.a, *supra* (explaining Government's charging decision); Argument, Part B.2.b.iii (explaining the many untenable discovery positions of the Government). Indeed, it has been the Government's conduct, both in cryptically revealing (or simply refusing to reveal) the theories underlying its creatively drafted charges and in taking untenable discovery positions in an effort to withhold as much discoverable information as possible, that has necessitated the filing of many of the motions in this case.

300. Moreover, despite the Government's constant attempt to conjure up the image of the tired, overworked attorney who must search high and low for discoverable information while simultaneously fighting off innumerable borderline-frivolous motions from the Defense, that is simply not the reality. PFC Manning is not being sued by some tired, overworked attorney in a shabby office; he is being prosecuted by the United States of America, which has full command of an arsenal of resources. Five full-time prosecutors are assigned to this case. Many more SJA attorneys and paralegals may be summoned for further assistance at a moment's notice. That the United States of America, represented in this case by five full-time prosecutors (and any additional SJA attorneys called in), has been unable to simultaneously manage its discovery obligations, case preparation, and motions practice is a testament not to the legitimate reasons for delay, but to the Government's own profound lack of diligence.

301. Thus, for these reasons, any potential Government excuse fails to justify the inordinate discovery delay in this case. Indeed, there is only one true reason for the delay, one which the Government would prefer to have swept under the rug: the Government was operating under a chronic misunderstanding of its own discovery obligations and how discovery rules operate in a classified evidence case for nearly two years. This true reason for delay is discussed below.

ii. The True Cause of Delay: The Government's Misunderstanding of Discovery Rules

302. Try as it might to argue otherwise, the Government simply cannot get around the undeniable fact that it was dead wrong about its discovery obligations for the first 698 days of PFC Manning's marathon 845-day pretrial confinement. The Government's misunderstanding of its bedrock discovery obligations, even for one day, would be virtually inexcusable. The fact that this misunderstanding persisted for 698 days is equal parts mind-boggling and disturbing. This misunderstanding is the true reason for the Government's discovery delay. It amounts to

gross negligence or, at the absolute least, simple negligence.²⁶ Either way, the Government's error is inexcusable and has caused substantial delay in PFC Manning's case.

303. To recap the circumstances of the Government's mistaken belief concerning the discovery rules – a mistaken belief that persisted for 698 days – the Defense first became aware of the Government's misunderstanding on 8 March 2012, when the Government filed its Response to the first Defense Motion to Compel. Appellate Exhibit XVI. In that Response, the Government revealed three chronic misunderstandings of the rules of military discovery: (1) that R.C.M. 703, and not R.C.M. 701, governed the Government's discovery obligations; (2) that *Brady* required the Government to turn over only evidence material to the merits of the case and not evidence that is material for sentencing purposes; and (3) that M.R.E. 505 permitted the Government, as opposed to the military judge, to be the arbiter of what should and should not be disclosed after balancing the interests of the accused against the national security concerns in a classified evidence case. *Id.* All of these grave errors were pointed out in the Defense's Reply to the Government's Response, filed on 13 March 2012. See Appellate Exhibit XXVI, at 1-2, 7.

304. Not backing down in the face of the Defense's irrefutable contentions, the Government persisted in maintaining its flatly incorrect positions. On 22 March 2012, the Government reiterated its positions in an email from then-CPT Fein to this Court. In that email, the Government stated that R.C.M. 701 does not apply to classified evidence and that the Government had, and would continue to, consult the provisions of MRE 505 to determine what information was discoverable and what information was not discoverable:

As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with *Brady* and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and *Brady* for regulation of what classified information is discoverable.

The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it

²⁶ Not even the Government can dispute that its misunderstanding of the military discovery rules constituted at least simple negligence.

intends to produce all discoverable information, under our legal and ethical obligations.

Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

Appellate Exhibit XLIII, at 8-9.

305. In this Court's 25 April 2012 ruling on the Defense Motion to Dismiss All Charges, this Court confirmed that the Government had indeed been operating under a grave misunderstanding of its discovery obligations up until the date of the ruling:

From the 8 March 2012 Government response to Defense Motion to Compel Discovery and its email of 22 March 2012, the Court finds that the Government believed RCM 701 did not govern disclosure of classified information for discovery where no privilege has been invoked under MRE 505. This was an incorrect belief. The Court finds that the Government properly understood its obligation to search for exculpatory *Brady* material, however, the Government disputed that it was obligated to disclose classified *Brady* information that was material to punishment only.

Appellate Exhibit LXVIII, at 2. Based on the Government's unawareness of its discovery obligations and other Government discovery conduct that raised some eyebrows (to say the least), this Court ordered the Government to provide a due diligence statement to the Court. See Appellate Exhibit CLXXVII, at 2-3.

306. The Government's failure to fully understand its basic discovery obligations from the outset of the case is wholly inexcusable. As the Army Court of Criminal Appeals has recently said, "[i]gnorance or misunderstanding of basic, longstanding ... fundamental, constitutionally-based discovery and disclosure rules by counsel undermines the adversarial process and is inexcusable in the military justice system." *United States v. Dobson*, 2010 WL 3528822, at *7 (A.Ct.Crim.App. Aug. 9, 2010). This case is one of the most important cases in military history – and there were no less than five prosecutors who had not bothered to read the Manual for Courts Martial. How could the entire prosecution team not have understood *basic* discovery rules? How could the entire team prosecuting a classified evidence case not have understood classified evidence? How could nobody in the SJA office have stepped in and said, "Wait, we're not even operating under the correct rules." There is no justification—and there can be no justification—for such an abject failure of the Government to understand the rules of the game. The Government has tried to sweep its profound discovery misunderstandings under the rug, pretending they didn't happen. In subsequent motions practice, the Government began articulating the correct *Brady* standard, as if it understood it all along. While the Court did not believe that the Government's failure of understand how discovery works warranted dismissal of the charges when the issue was raised in March 2012, the Court now has the benefit of a more fulsome picture: a picture that features an inept and deceitful prosecution.

307. The Government's mistaken interpretation and understanding of the discovery rules lasted an incredible 698 days after PFC Manning was placed into pretrial confinement. This grave error has caused substantial delay. Based in large part on the Government's erroneous interpretation of its *Brady* obligations, the Government is *still*, 845 days after PFC Manning was placed into pretrial confinement, completing its *Brady* searches. The Defense is *still* awaiting discovery. In a very real sense, the reverberations of the Government's chronic misunderstandings regarding military discovery rules is still causing delay in the proceedings to this day. Therefore, this true reason for the Government's discovery delay weighs heavily in finding an Article 10 and Sixth Amendment violation in this case.

308. The recent well-reasoned decision by our superior court in *Simmons* is instructive on this point. In *Simmons*, the Army Court of Criminal Appeals found that the Government violated the accused's Article 10 speedy trial rights in bringing him to trial after 135 days of pretrial confinement. 2009 WL 6835721, at *1, 4. This conclusion was based in large part on the Government's erroneous interpretation of the Status of Forces Agreement (SOFA) between the United States and the Republic of Korea. *See id.* at *9-10. The Government interpreted the SOFA (mistakenly, it turned out) as requiring the Government to delay prosecution of a Soldier in all cases where the Republic of Korea had primary jurisdiction of the case until either the Government received a waiver of jurisdiction by the Republic of Korea or the Republic of Korea completed its own criminal proceedings against the Soldier. *Id.* at *1. The Government concluded that the Republic of Korea had primary jurisdiction over Simmons' case and that the Government therefore would need to delay its own prosecution of Simmons. *Id.* As it turned out, the Government's interpretation of the SOFA was incorrect. *Id.* at *2. As the *Simmons* Court explained, "the SOFA clearly and specifically grants primary jurisdiction to the United States 'over members of the United States armed forces . . . in relation to . . . offenses solely against the person of . . . a dependent.'" *Id.* (quoting the SOFA). Once the military judge set the Government straight on the proper interpretation of the SOFA, the Government conceded that the United States had had primary jurisdiction over Simmons' case all along. *Id.*

309. In the Article 10 analysis, the Government's mistaken interpretation of the SOFA cost the Government dearly. *See id.* at *9-10. As the *Simmons* Court explained:

On its face, the government's negligent, i.e. *unreasonable* interpretation of its own SOFA seems the polar opposite of *reasonable* diligence. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett v. United States*, 505 U.S. [647,] 657 [(1992)]. However, a finding of government negligence that is responsible for a period of delay in bringing an accused to trial does not prohibit a conclusion that the government acted with reasonable diligence overall. *See United States v. Lazaikas* [sic], 2004 CCA LEXIS 199, *13 (A.F.Ct.Crim.App. Aug. 19, 2004) (unpub.) The weight we ascribe to government negligence also varies depending on the gravity of the negligence at issue – simple negligence weighs lighter than gross negligence. The length of delay the negligence causes is also a consideration; a longer delay

resulting from government negligence weighs more heavily against it than does a shorter delay.

The government's conduct here, in misreading its own international agreement from the inception of appellant's pretrial confinement until the day the military judge heard the speedy trial motion 107 days later, was, in our view, negligent. The government's negligence in misreading the SOFA, regardless of whether it is characterized as simple or gross, only stymied the government's processing of appellant's case until the Republic of Korea completed the unnecessary waiver of primary jurisdiction on 11 January. We believe that even gross negligence for a portion of a court-martial's processing time does not automatically result in violation of Article 10, UCMJ; rather, it is part of the "difficult and sensitive balancing test" we must perform to determine whether, *in toto*, the government proceeded with reasonable diligence. This reason for delay is weighted heavily against the government.

Id. at *9 (emphasis in original). In an effort to justify the Government's erroneous interpretation of the SOFA, the Government and the military judge pointed out that the original trial counsel in Simmons' case was new and relatively inexperienced. *Id.* at *10. The *Simmons* Court was unmoved:

Captain B, the original trial counsel, was new to the brigade and new to military justice. This was one of the military judge's primary justifications in favor of finding no Article 10, UCMJ, violation. We categorically reject this as a legitimate reason for delay. Faced with a similar "inexperienced" argument more than forty years ago when it was proffered to explain the lack of diligence of non-lawyer commanders, the Court of Military Appeals forcefully rejected it as well. The court responded: "As to the inexperience of the officers involved, we do not believe this is a legally or factually sufficient explanation. Whether they thought they were doing their job is irrelevant. The plain fact of the matter is that the delay occurred." *Parish*, 17 U.S.C.M.A. at 417, 38 C.M.R. at 215.

The record of the speedy trial motion also makes clear that CPT B had a number of other trial counsel with whom to consult, a chief of criminal law, and a staff judge advocate. Unlike the hapless non-lawyers in *Parish*, CPT B also had available to him all the wonders of the technological age. It is no excuse whatsoever that he was "new." We refuse to view the question of whether the government acted with reasonable diligence through a prism of the government counsel's experience and adjust it or appellant's right to a speedy trial accordingly. Moreover, the government assigned another more experienced trial counsel to appellant's case in late January or early February, and there is no evidence why this could not have occurred earlier.

Id. (footnote omitted).

310. Here, the Government's failure to understand its basic discovery obligations for 698 days is far more negligent than the Government's erroneous interpretation of the SOFA in *Simmons*. While the *Simmons* Court declined to speculate whether the Government's incorrect interpretation of the SOFA constituted simple or gross negligence, *see id.* at *9, there can be little doubt that a prosecutor's grave misunderstanding of his discovery obligations for almost two years into the processing of the case constitutes gross negligence of the highest order. Even if the Government's negligence in this case is characterized as only simple negligence (which it should not be), the *Simmons* Court made clear that an Article 10 violation can be found based on simple negligence on the part of the Government. *See id.* ("The government's negligence in misreading the SOFA, regardless of whether it is characterized as simple or gross, only stymied the government's processing of appellant's case until the Republic of Korea completed the unnecessary waiver of primary jurisdiction on 11 January This reason for delay is weighted heavily against the government.").

311. The *Simmons* Court also explained that the delay caused by the negligence is also a relevant consideration. The Government's negligent failure to understand its discovery obligations clearly caused more delay in this case than the Government's inaccurate interpretation of the SOFA caused in *Simmons*. In *Simmons*, the total delay was 135 days. *See id.* at *4. The delay caused by the Government's erroneous interpretation of the SOFA amounted to 25 days. *See id.* at *17. Here, by contrast, PFC Manning has been in pretrial confinement for a grand total of 845 days. While the delay occasioned by the Government's misunderstandings of its discovery obligations is not as easily quantified as the delay caused by the Government's negligence in *Simmons*, the delay caused by the Government's negligence in this case is far more substantial than the 25 days of delay in *Simmons*. The Government in this case has represented that it has been conducting its *Brady* searches since April 2011. For 698 days of this case, it didn't even know what its *Brady* obligations were. Even now, 845 days after this case began, the Government is still conducting its *Brady* searches, hopefully with a proper understanding of what it needs to look for this time around. The Defense is still waiting on crucial discovery. The case is still languishing in the discovery phase, with trial still several months away. Therefore, there can be little doubt that the Government's inexcusable ignorance of its basic discovery obligations caused an inordinate amount of delay in this case.

312. Finally, as *Simmons* helpfully instructs, inexperience of the trial counsel is no excuse for delays caused by the Government's negligence. *See id.* at *10. Thus, although the Government has yet to come forth with an excuse for its failure to understand how discovery works in classified evidence cases in the military, to the extent it seeks to hide behind its collective inexperience with classified evidence cases, such an attempt would be wholly unsuccessful.

313. In the end, the Government in both *Simmons* and this case was negligent. That negligence caused delay in both cases. As the *Simmons* Court weighed the "reasons for delay" factor heavily against the Government as a result of Government negligence that caused 25 days of delay, this Court must similarly weigh that factor heavily against the Government as a result of its negligence, which has caused delay far, far in excess of 25 days. Indeed, the words that the Court of Military Appeals uttered in *Kossman* are particularly apt here:

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.